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# The Public Trust Doctrine, Environmental Human Rights, and the Future of Private Property

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# THE PUBLIC TRUST DOCTRINE, ENVIRONMENTAL HUMAN RIGHTS, AND THE FUTURE OF PRIVATE PROPERTY

DAVID TAKACS\*

## INTRODUCTION

Who owns the Earth and its resources? To what extent may the general public claim the pure water, clean air, rich soil, and the myriad services Earth provides to sustain human life? Across continents and spanning centuries, a dynamic tension continues between those who would circumscribe the Earth's bounty for private use and those who would carefully allot Earth's riches to satisfy human needs.<sup>1</sup>

Private property—sequestering Earth's resources for personal, exclusive use—has its zealous advocates, and in many locales its legal status is unimpeachable, and its ideology is unquestioned. But a competing ideology, dating from antiquity, holds that some of Earth's riches should never be sequestered for private use, must be left for the public's enjoyment, and must be stewarded by those in power. Codified 1,500 years ago during the Roman Empire, legal scholars labeled this the "Public Trust Doctrine."

The Public Trust Doctrine perseveres as a value system and an ethic as its expression in law mutates and evolves. More recently, scholars, activists, and lawyers have begun discussing the *rights* of people to access and enjoy various essential resources and

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<sup>1</sup> Of course, many environmentalists argue that regions of the Earth should be sustained for nonhuman use. Delightful though I find that idea, I treat it only tangentially herein.

services the Earth so generously yields. The spreading notion of "Environmental Human Rights" expresses the same persistent notion that sometimes, for some resources and in some places, it is immoral and illegal for private parties to arrogate what the Earth provides freely and what is necessary for human health and happiness.

Yet the "Public Trust Doctrine" and "Environmental Human Rights" do not convey precisely the same idea and do not carry the same legal weight in the United States or abroad. I begin this article by tracing the historical origins of the Public Trust Doctrine, charting its (r)evolutionary leaps across centuries, continents, legal regimes, and environmental entities. I show how Joseph Sax, a law professor, breathed new legal, philosophical, and political life into the idea. I then shift legal gears and introduce the eliding, slippery connotations of the term "rights." I explore how the notion of "Environmental Human Rights" complements and expands the Public Trust Doctrine's legal connotations, which, for 1,500 years, have constrained how Earth's resources can be used and have guided who must bear responsibility for stewarding resources for the public good.

When employed individually, as I illustrate for Pennsylvania and California, the Public Trust Doctrine and Environmental Human Rights may constrain what government officials and private property owners may do. When working together in synergism—as they do in South Africa, India, and elsewhere, as I shall investigate here—they impose new responsibilities on governments to steward the Earth for the benefit of citizens, and they put powerful constraints on what counts as "private," "property," and "ownership"—calling into question what "owners" can do with "their" land.

As humans destroy habitat, impair ecosystems, and change climate, we will more acutely depend on functioning ecosystems. Those who would protect the Earth and its human citizens will, I believe, make more extensive use of the Public Trust Doctrine and Environmental Human Rights to develop legal strategies that preserve for the many what should not be fenced off by the few. This article provides a guide for how to proceed.

## I. THE PUBLIC TRUST DOCTRINE

### A. *A Brief History of the Public Trust Doctrine*

1,500 years ago, the Roman Emperor Justinian simplified the jumble of laws governing his Empire. He commissioned dozens of the era's leading jurists, whose wisdom became codified in the *Corpus Juris Civilis*.<sup>2</sup> In 529, Justinian added these words to one section: "By the law of nature these things are common to all mankind, the air, running water, the sea and consequently the shores of the sea."<sup>3</sup> The Public Trust Doctrine, as this notion came to be known, suggests that certain resources—usually water, but now much more—are common, shared property of all citizens, stewarded in perpetuity by the State.<sup>4</sup>

Several hundred years after the fall of the Roman Empire, a copy of the *Corpus Juris Civilis* was rediscovered in Pisa, and scholars spent centuries analyzing the tome.<sup>5</sup> In the peripatetic manner that has come to characterize it, the Public Trust Doctrine migrated with the *Corpus Juris Civilis* throughout Europe, to both civil law and common law regimes.<sup>6</sup> The Magna Carta codified Justinian's words in England, and in 1225 King John was forced to revoke his cronies' exclusive fishing and hunting rights, because this violated the public's right to access these common resources.<sup>7</sup> Thus in England, while the King had vested ownership of public lands, he stewarded them in trust for the public. This notion of government ownership of resources held in trust as a commons is a shared precept in all places where the Public Trust Doctrine persists.<sup>8</sup>

The Public Trust Doctrine passed into the common law of the individual states during America's founding years, following the

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<sup>2</sup> THOMAS GLYN WATKIN, AN HISTORICAL INTRODUCTION TO MODERN CIVIL LAW 63 (1999).

<sup>3</sup> Mark Dowie, *In Law We Trust*, ORION, July–Aug. 2005, at 18, 20.

<sup>4</sup> *Id.* at 19.

<sup>5</sup> WATKIN, *supra* note 2, at 81.

<sup>6</sup> See Patrick Deveney, *Title, Jus Publicum, and the Public Trust: A Historical Analysis*, 1 SEA GRANT L.J. 13, 26 (1976); Carl Shadi Paganelli, *Creative Judicial Misunderstanding: Misapplication of the Public Trust Doctrine in Michigan*, 58 HASTINGS L.J. 1095, 1098–02 (2007); Joseph L. Sax, *Liberating the Public Trust Doctrine from Its Historical Shackles*, 14 U.C. DAVIS L. REV. 185, 189 (1980).

<sup>7</sup> Dowie, *supra* note 3, at 20–21.

<sup>8</sup> *Id.* at 21.

“general rule that land titles from the federal government run down only to the high water mark, with title seaward of that point remaining in the states, which, upon their admission to the Union, took such shorelands in ‘trusteeship’ for the public.”<sup>9</sup> At least for the first two centuries in the United States, the Public Trust Doctrine did not extend to dry land.<sup>10</sup> The Public Trust Doctrine formally entered American jurisprudence in 1821, when the New Jersey State Court held in *Arnold v. Mundy* that the government could not, “consistently with the principles of the law of nature and the constitution of a well ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right.”<sup>11</sup>

*Illinois Central Railroad v. Illinois* is the seminal American case framing the Public Trust Doctrine.<sup>12</sup> When Illinois attempted to give Chicago’s entire lakeshore to a private railroad, the Supreme Court held that the lake and the ground under were protected by “a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties.”<sup>13</sup> The Public Trust Doctrine did not mean these resources were frozen in time and use. The legislature could pass statutes facilitating navigation (e.g., building wharves or docks), and a legislature might discharge resources held in the public trust.<sup>14</sup> But such actions are limited by the principle that “control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.”<sup>15</sup>

*Illinois Central* stands for the proposition that the Public Trust Doctrine does not allow the state government to abdicate its stewardship of navigable water bodies or the land under them, as

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<sup>9</sup> Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 476 (1970).

<sup>10</sup> See *id.*

<sup>11</sup> *Arnold v. Mundy*, 6 N.J.L. 1, 53 (1821).

<sup>12</sup> 146 U.S. 387 (1892); see JOSEPH L. SAX, *DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION* 170–71 (1971).

<sup>13</sup> *Ill. Cent.*, 146 U.S. at 452.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 453.

“[s]uch abdication is not consistent with the exercise of that trust which requires the government of the State to preserve such waters for the use of the public.”<sup>16</sup> Legislatures must exercise their police powers consistent with the public trust, and may not subjugate this stewardship responsibility to needs of private interests: “[t]he trust devolving upon the State for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property.”<sup>17</sup> While other common law doctrines may be undone by explicit legislation, the Public Trust Doctrine seems sacrosanct, holding a power beyond modification or revocation by legislative action.<sup>18</sup>

We see in the *Illinois Central* decision three elements that will inform subsequent evolution of the Public Trust Doctrine in American jurisprudence: the sovereign holds certain resources in trust for the common good; the public has some kind of right to protection of these resources; and while democracy may seem subverted when a court overrules the acts of elected officials, such judicial acts in fact serve democracy by preserving rights invested in all the people.

### B. *Joseph Sax and the Public Trust Doctrine*

Occasionally law review articles change the world. As one scholar puts it, Joseph Sax’s article, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, “represents every law professor’s dream: a law review article that not only revived a dormant area of the law but continues to be relied upon by courts some two decades later.”<sup>19</sup> This still holds true more than three decades later, including, as I describe below, in India and South Africa. Sax found in the Public Trust Doctrine a legal tool that any citizen could use to fight exploitation of resources that should rightfully be protected common property. In his writings, as I will trace here, Sax elucidates the Public Trust Doctrine and lays out a vision for how the doctrine has worked and

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> Harrison C. Dunning, *The Public Trust: A Fundamental Doctrine of American Property Law*, 19 ENVTL. L. 515, 523 (1989).

<sup>19</sup> Michael C. Blumm, *Public Property and the Democratization of Western Water Law: A Modern View of the Public Trust Doctrine* 19 ENVTL. L. 573, 574 (1989) (citing Sax, *Public Trust Doctrine*, *supra* note 9).

should work in American jurisprudence.

Three conceptual principles justify the Public Trust Doctrine.<sup>20</sup> First, “certain interests are so intrinsically important to every citizen that their free availability tends to mark the society as one of citizens rather than of serfs.”<sup>21</sup> Thus no small subset of individuals should ever be allowed to control these interests.<sup>22</sup> Second, “certain interests are so particularly the gifts of nature’s bounty that they ought to be reserved for the whole of the populace.”<sup>23</sup> Finally, “certain uses have a peculiarly public nature that makes their adaptation to private use inappropriate.”<sup>24</sup>

From these philosophical underpinnings derive further fundamental principles inherent in the Public Trust Doctrine. First, citizens have legally enforceable rights equal in dignity to private property owners.<sup>25</sup> When people talk of a “right to a decent environment,” it implies that people have rights “simply by virtue of their status as members of the public and that those rights should be phrased in a way to put them on a plane with traditional private property rights.”<sup>26</sup> Sax evokes the Public Trust Doctrine to make what has previously been considered valueless—i.e., resources held for the public good—accrue economic value comparable to that accorded private property.<sup>27</sup>

But declaring “rights” alone won’t solve problems of public trust resource exploitation. Sax is concerned with a “problem that frequently arises in public trust cases—that is, a diffuse majority is made subject to the will of a concerted minority.”<sup>28</sup> That “concerted minority” is private property owners whose private economic interests lead them to arrogate ecological resources, which, by right, belong to the public.<sup>29</sup> From Justinian onward, the public was not always entitled to enforce its interest in its common property.<sup>30</sup> For Sax, “[a]n essential question that must be asked

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<sup>20</sup> Sax, *Public Trust Doctrine*, *supra* note 9, at 484.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 485.

<sup>25</sup> See SAX, DEFENDING, *supra* note 12, at xix.

<sup>26</sup> *Id.* at 158.

<sup>27</sup> See SAX, DEFENDING, *supra* note 12, at 173.

<sup>28</sup> *Id.* at 560

<sup>29</sup> See *id.*

<sup>30</sup> See *id.* at 475.



whenever proposals for an environmental declaration of rights are raised is whether those rights are going to be enforceable, and if so, by whom.”<sup>31</sup>

Sax finds a *procedural* right to challenge government decisions that violate stewardship responsibilities inherent in the Public Trust Doctrine. The Public Trust Doctrine “is no more—and no less—than a name courts give to their concerns about insufficiencies of the democratic process.”<sup>32</sup> Citizens must be allowed to intervene in the process between the powerful private interest and the corruptible professional regulator.<sup>33</sup> The Public Trust Doctrine means undoing a system where the “citizen who comes to an administrative agency comes essentially as a supplicant, requesting that somehow the public interest be interpreted to protect the environmental values from which he benefits. The citizen who comes to court has quite a different status—he stands as a claimant of rights to which he is entitled.”<sup>34</sup> For Sax, the “public” should necessarily have standing to speak for its own rights, for what they mean, and for when they are violated. And thus Sax cites *Illinois Central* for the

central substantive thought in public trust litigation. When a state holds a resource which is available for the free use of the general public, a court will look with considerable skepticism upon *any* government conduct which is calculated *either* to reallocate that resource to more restricted uses *or* to subject public uses to the self-interest of private parties.<sup>35</sup>

While the actual use is not frozen, legislatures (with judicial oversight) may only change what the use is as the public needs or values change.<sup>36</sup> Furthermore, the Public Trust Doctrine does not connote the government’s everyday general obligation to act for the public good; rather, the Public Trust Doctrine demands a “special, and more demanding, obligation which it may have as a trustee of certain public resources.”<sup>37</sup>

Thus Sax’s notion of the Public Trust Doctrine articulates a philosophy where public interests in the environment do and

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<sup>31</sup> SAX, DEFENDING, *supra* note 12, at 235.

<sup>32</sup> Sax, *Public Trust Doctrine*, *supra* note 9, at 521.

<sup>33</sup> *See id.* at 498.

<sup>34</sup> SAX, DEFENDING, *supra* note 12, at 58.

<sup>35</sup> Sax, *Public Trust Doctrine*, *supra* note 9, at 490.

<sup>36</sup> *See, e.g., id.* at 495.

<sup>37</sup> *Id.* at 478.

should trump private interests. Sax derives a democratic means for enforcing these public interests, as “[t]o devise a theory of public rights and a means of enforcing them is thus an essential step towards protecting environmental values.”<sup>38</sup> Sax wants “a fundamental realignment of power” with the citizen as “an active initiator with the authority to tip the balance of power” from public to private, from bureaucrats to everyman, from exploitation to sustainable stewardship.<sup>39</sup> The Public Trust Doctrine names an ancient belief about the proper relationship between citizens, nature, and government; each successful legal use of the Public Trust Doctrine translates this belief into more responsible stewardship of natural resources.

### C. *Resources Protected by the Public Trust Doctrine*

The Public Trust Doctrine’s power comes from the longstanding idea that some parts of the natural world are gifts of nature so essential to human life that private interests cannot usurp them, and so the sovereign must steward them to prevent such capture. The philosophy and the obligation are the central elements of the doctrine, not the specific resources to which the ideas and duties attach. As such, the Public Trust Doctrine’s reach seems constrained only by the imagination of those who would protect both the natural world and the public’s right to the sustainable use of that world.

While Sax’s notion of the Public Trust Doctrine focused heavily on the public *interest* in resources and how those interests may be safeguarded, others emphasize an expanded set of resources themselves that the Public Trust Doctrine safeguards.<sup>40</sup> While Professor William Araiza summarizes criticisms of the Public Trust Doctrine as a “backward-looking, antidemocratic vestige whose time, if it ever existed, has passed,” he also argues that its successes have energized activists who have used it to shore up resource protection beyond the Doctrine’s traditional shores.<sup>41</sup> Furthermore, as we shall see below, the doctrine has

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<sup>38</sup> SAX, DEFENDING, *supra* note 12, at 59.

<sup>39</sup> *Id.* at 64.

<sup>40</sup> See, e.g., Charles F. Wilkinson, *The Public Trust Doctrine in Public Land Law*, U.C. DAVIS. L. REV. 269, 315–16 (1980).

<sup>41</sup> William Araiza, *Democracy, Distrust, and the Public Trust: Process-based Constitutional Theory, the Public Trust Doctrine, and the Search for a Substantive Environmental Value*, 45 UCLA L. REV. 385, 404 (1997).

been astonishingly malleable in buttressing fundamental human rights to a range of ecological resources in India, South Africa, and elsewhere.

From Justinian's time until quite recently, the Public Trust Doctrine covered a narrow range of resources. For the most part, the Public Trust Doctrine has protected "that aspect of the public domain below the low-water mark on the margin of the sea and the great lakes, the waters over those lands, and the waters within rivers and streams of any consequence."<sup>42</sup> Occasionally United States common law explication of the Public Trust Doctrine has included parklands donated to the public.<sup>43</sup>

Journalist Mark Dowie asks this key question that has been pursued by other defenders of environmental resources: "[w]hy then, can't a doctrine that was designed to defend and protect a very narrow aspect of the commons, water, not evolve, as so much of our common law has evolved, to protect more if not all of the commons?"<sup>44</sup> Similarly, Sax urged "Liberating the Public Trust Doctrine from Its Historical Shackles."<sup>45</sup> Earlier, he had suggested that the substantive and procedural protections courts had granted under the Public Trust Doctrine could certainly be applied to "controversies involving air pollution, the dissemination of pesticides, the location of rights of way for utilities, and strip mining or wetland filling on private lands in a state where governmental permits are required."<sup>46</sup> Furthermore, he believed the Public Trust Doctrine could be applied to social welfare and consumer controversies.<sup>47</sup>

Professor Harrison Dunning suggests that fish, wildlife, and wilderness areas might easily fall under the protections of the Public Trust Doctrine because they are scarce resources naturally suited for public use.<sup>48</sup> And, in fact, the Public Trust Doctrine has been quite peripatetic in the years since Sax reinvigorated it. Professor Lloyd Cohen describes the Public Trust Doctrine's "journey from the sea, up navigable streams, to unnavigable streams, its leap to inland ponds, and then like our amphibian

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<sup>42</sup> Sax, *Public Trust Doctrine*, *supra* note 9, at 556.

<sup>43</sup> *Id.*

<sup>44</sup> Dowie, *supra* note 3, at 24.

<sup>45</sup> Sax, *Liberating*, *supra* note 6, at 185.

<sup>46</sup> Sax, *Public Trust Doctrine*, *supra* note 9, at 556–57.

<sup>47</sup> *See id.* at 557.

<sup>48</sup> *See Dunning*, *supra* note 18, at 518–19, 523.

ancestors its eventual emergence from the water and march across the land.”<sup>49</sup> Courts have held that the Public Trust Doctrine applies to wildlife.<sup>50</sup> Araiza documents that resources covered under the Public Trust Doctrine have extended to parks, historical areas, cemeteries, archaeological sites and remains, works of art, and recreation areas.<sup>51</sup> As we will see below, a seminal case establishing the Public Trust Doctrine in India was about a public park and market.<sup>52</sup>

Sax and those scholars who have followed him provide us with an adroit legal tool rooted in a venerable ethical obligation. That tool can be (and has been) used to maintain or shift control of a wide range of ecological resources from private to public use. But the Public Trust Doctrine has its legal shortcomings. Its underlying philosophy finds potent, updated legal expression in the evolving notion of Environmental Human Rights, as I shall explore in the following sections.

## II. RIGHTS

*Rights* is a slippery term: try to gain a purchase on it, and it may wriggle out of your grasp. In this section, I shall very briefly outline different conceptions of “rights,” and explain what we mean when we talk about Environmental Human Rights.

Various classifications of rights exist, yet each poses categories with porous boundaries. Some taxonomies discuss “generations” of human rights: civil and political rights (e.g., rights to life, liberty, privacy) are “first generation” rights; economic, social and cultural rights (e.g., rights to health, education, work) are “second generation” rights; and “third generation” rights (including the right to development and the right to environment considered here) are recent and more controversial.<sup>53</sup> In some classifications, civil and political rights are given priority for

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<sup>49</sup> Lloyd R. Cohen, *The Public Trust Doctrine: An Economic Perspective*, 29 CAL. W. L. REV. 239, 256 (1992). Cohen considers this change “fundamental, radical, and illegitimate.” *Id.*

<sup>50</sup> See, e.g., *Owsichuk v. State Guide Licensing & Control Bd.*, 763 P.2d 488, 494–95 (Alaska 1988). See also *Wade v. Kramer*, 459 N.E.2d 1025, 1027 (Ill. App. Ct. 1984).

<sup>51</sup> Araiza, *supra* note 41, at 402.

<sup>52</sup> See *infra* note 138, Part IV.A.

<sup>53</sup> JAVAID REHMAN, *INTERNATIONAL HUMAN RIGHTS LAW: A PRACTICAL APPROACH* 6–7 (2003).

immediate implementation; economic, social, and cultural rights are to be implemented progressively, as resources allow; and legal experts still debate whether third generation rights are actually rights that pose any obligations.<sup>54</sup> Other commentators afford equal weight to all rights, and argue that all are “universal, indivisible and interdependent and interrelated.”<sup>55</sup> Some classifications separate “universal” from regional or culturally relative rights.<sup>56</sup> We can also separate rights declared in “soft law” instruments (e.g., national or regional court decisions, declarations of political organs, U.N. General Assembly declarations, U.N. reports from working groups or special rapporteurs) that are “aspirational” and may not yet bind states, from “hard law,” or rights named in treaties or charters that do bind states, sometimes whether or not they are parties to the given treaty.<sup>57</sup> Yet nations often act as if soft law norms do bind them, and thus soft law often elides into hard law.<sup>58</sup>

#### A. *Three Types of Rights*

In this article, as I discuss environmental *rights*, I will discern at least three different meanings of the word, which might correspond to “rights,” rights, and *rights*. Furthermore, these meanings are not enclosed by bounded categories; rather, *rights* talk implies a sliding scale, so that the categories are more like a spectrum ranging from fragile, revocable “rights” to inviolable, supreme *rights*, with all gradations in between.

“Rights” are legal privileges that may be temporary or fungible. For example, when I quote the California Constitution below on the “right to water,” I am discussing a limited “right”: it can easily (at least when compared with rights or *rights*) be revoked or conditioned. These “rights” correspond to what Sax

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<sup>54</sup> *Id.* at 7.

<sup>55</sup> *Id.* (quoting United Nations World Conference on Human Rights, *Vienna Declaration and Programme of Action*, ¶ 5, U.N. Doc. A/CONF.157/23 (June 25, 1993)).

<sup>56</sup> *Id.* at 5.

<sup>57</sup> *Id.* at 23; RICHARD B. LILICH, HURST HANNUM, S. JAMES ANAYA, & DINAH L. SHELTON, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY, AND PRACTICE 136–37, 142 (2006); Dinah Shelton, *Commentary and Conclusions*, in COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 449–50, 461–62 (Dinah Shelton ed., 2000).

<sup>58</sup> Shelton, *supra* note 57, at 461–62.

refers to as usufructuary, a “right” that incorporates the interests of others and thus a “right” that one does not own “in the same way he owns his watch or his shoes.”<sup>59</sup>

Moving along the spectrum, rights are more fundamental guarantees. They are the kinds of things constitutions enshrine. They connote privileges that inhere in citizens because they are considered essential to the dignity or freedom of each citizen. The Environmental Human Rights discussed below from Article 24 of the South African Constitution and derived from Article 21 of the Indian Constitution fit this notion of rights.

Professor Jona Razzaque explains that constitutionally guaranteed rights are not absolute: sometimes, limitations may be placed that are “reasonable and justifiable as it is in an open and democratic society based on human dignity, equality and freedom; and will take into account all relevant factors, including the nature of the right, the importance and purpose of the limitation.”<sup>60</sup> Nonetheless, these rights confer considerable power on the rights holder, and once codified, these rights can be realized through legislation that promotes the rights, through judicial decisions that reinforce them, and through mobilizing an apparatus of shaming when rights are violated.

The rights guaranteed by the Public Trust Doctrine—in the absence of named, constitutional environmental rights—fall somewhere between “rights” and rights, but closer to the latter. Absent stipulated constitutional Environmental Human Rights, the Public Trust Doctrine stands both for the procedural and substantive rights that citizens may have in the name of certain environmental resources that are widely understood to belong to them inherently, and to the corresponding duties that sovereigns have to protect and advance those rights. Sax described citizens’ rights to public trust resources not as absolute rights, but “subject to the reasonable demands of other users.”<sup>61</sup> Furthermore, these rights are subject to a balancing test “to retain the largest measure of public use consistent with needful development and industrialization.”<sup>62</sup> This utilitarian argument that public trust

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<sup>59</sup> Sax, *Public Trust Doctrine*, *supra* note 9, at 485.

<sup>60</sup> JONA RAZZAQUE, PUBLIC INTEREST ENVIRONMENTAL LITIGATION IN INDIA, PAKISTAN AND BANGLADESH 85 (2004).

<sup>61</sup> Sax, DEFENDING, *supra* note 12, at 162.

<sup>62</sup> *Id.* at 167.

rights preserve the greatest good for the greatest number of citizens differs from a notion of rights that confers more absolute protections for the rights holder.

Where environmental rights are named and guaranteed in constitutions, the Public Trust Doctrine is sometimes invoked to support the longstanding notion that the sovereign must protect what have always been public trust rights but are now hard, enshrined environmental rights. As we will see, India and South Africa take the background philosophy of Environmental Human Rights that the Public Trust Doctrine has stood for, make these rights explicit in their constitutions, then borrow the Public Trust Doctrine to add 1,500 years of tradition and two centuries of American case law to buttress the argument that the government is obliged to act to protect these Environmental Human Rights.

Fifth Amendment property rights, as interpreted by United States courts, also fall somewhere between “rights” and rights. They, too, are subject to a wide range of conditions imposed in the name of the public good. Even the takings clause—“nor shall private property be taken for public use, without just compensation”<sup>63</sup>—puts explicit conditions on these “rights,” saying that they can be limited by something as expansively conceived as the “public good.” I will return to this below.

At the far end of the *rights* spectrum are *rights* that are procedurally and substantively inviolable. They are supreme to any state or national laws. *Rights* connote absolute privileges that may not be violated by anyone ever. When consensus coalesces around a “human *right*,” it “indicates that the rights under consideration are rights pertaining to human beings by virtue of their humanity.”<sup>64</sup> The Preamble to the Universal Declaration of Human Rights affirms that the purpose of the document is to provide “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family.”<sup>65</sup> That is, these rights belong to all humans *inherently*.<sup>66</sup>

The Universal Declaration of Human Rights is aspirational: its authors and signatories desired that all the rights listed therein

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<sup>63</sup> U.S. CONST. amend. V.

<sup>64</sup> A.H. Robertson, *Human Rights in the World*, in LILlich ET AL., *supra* note 57, at 93.

<sup>65</sup> G.A. Res. 217A (III), U.N. Doc A/810 (Dec. 10, 1948).

<sup>66</sup> LILlich ET AL., *supra* note 57, at 2.

would eventually become inviolable *rights*. Its framers recognized that human rights evolve, in a slow accretion of layers of international consensus that may gradually solidify in positive law (treaties, conventions, declarations, statutes, and the like). As consensus builds, fungible “rights” become fundamental rights, and may become inviolable *rights*.

When consensus forms around protecting something as a human *right*, it creates generally nonderogable obligations, i.e., obligations that are not voluntary but mandatory. Some human rights are so universally recognized they become *jus cogens* norms, i.e., inviolable human rights from which no citizen, government official, or nation anywhere may ever derogate.<sup>67</sup> Not only may a state or individual not violate a *jus cogens* right; they are affirmatively required to advance that right to the best of their abilities. To refer to a *jus cogens* right is to say that we have transcended cultural relativism to find something that embraces all individuals in all nations.<sup>68</sup> When personal entitlements become enshrined as inviolable *rights*, they are supreme to any domestic laws of any nation.<sup>69</sup> Those who violate these rights face criminal prosecution, or a variety of shaming mechanisms meted out by various international organs, national governments, and NGOs. Such rights currently comprise an extremely limited set: candidates for universally acknowledged *jus cogens* norms include rights to be free from slavery, genocide, apartheid (or more broadly racial discrimination), torture, or aggressive warfare conducted not in self defense.<sup>70</sup>

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<sup>67</sup> This principle is codified for state parties in the Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331, 344.

<sup>68</sup> See LILICH ET AL., *supra* note 57 at 38.

<sup>69</sup> See *id.* at 103.

<sup>70</sup> See, e.g., RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 reporters' note 6 (1987); I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 513 (1990). Other sources broaden the potential candidates for *jus cogens* norms, e.g., several of the rights enshrined in the Universal Declaration of Human Rights such as right to equality, life, liberty, security fair trial, and presumption of innocence. See REHMAN, *supra* note 53, at 61. The Ninth Circuit states clearly (in a case involving gross environmental crimes): “Acts of racial discrimination are violations of *jus cogens* norms.” *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1209 (9th Cir. 2007). Professor Abate suggests that “cultural genocide” should be recognized as a *jus cogens* norm as a way of forcing nations to act on global warming. Randall S. Abate, Assistant Professor, Fla. Coastal Law Sch., Presentation at Stanford University Symposium on Climate Change Liability and the Allocation of Risk, (Feb. 24, 2007).



### B. *Environmental Human Rights*

Environmental Human Rights have not settled in a location on the spectrum described above. I believe recognition of global Environmental Human Rights is trending towards the kind of fundamental rights implied in the Public Trust Doctrine and various constitutions. If this momentum continues—as, I believe, is likely as humans continue to undercut Earth’s life support systems—Environmental Human Rights may become absolute **rights** that create non-derogable duties for all private and public actors.<sup>71</sup>

In comprehensive reviews of the development of Environmental Human Rights, Barry Hill et al. find that the “right to a clean and healthy environment appears to be moving, slowly but surely, to a higher degree of relevance,”<sup>72</sup> and University of Wisconsin Law School professor Sumudu Atapattu finds a “slow” emergence of the idea that humans have a basic right to a healthy environment.<sup>73</sup> While the U.N. Human Rights Commission appointed a Special Rapporteur for Human Rights and the Environment, whose 1994 final report included Draft Principles on Human Rights and the Environment,<sup>74</sup> the Commission has never ratified these Draft Principles.<sup>75</sup>

Nonetheless, in a 2005 report to the Human Rights Commission, Earthjustice documents the “repeated and increasing recognition of a human rights-based approach to environmental

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<sup>71</sup> See RAZZAQUE, *supra* note 60, at 87 (discussing the expansion of the fundamental right to life in India, Pakistan, and Bangladesh to include a right to a healthy/clean environment).

<sup>72</sup> Barry E. Hill, Steve Wolfson, & Nicholas Targ, *Human Rights and the Environment: A Synopsis and Some Predictions*, 16 GEO. INT’L ENVTL. L. REV. 359, 399–400 (2004). Hill et al. evaluate the right in terms of evolution from soft law to hard law, suggesting that the latter is equivalent to the right being “enforceable” and thus truly existing. *Id.* at 361–62. However, as I formulate it, “rights,” rights, and **rights** are all expressed in various forms in hard law, which says nothing about how permanent, justiciable, or universal those rights are.

<sup>73</sup> Sumudu Atapattu, *The Right to a Healthy Life or the Right to Die Polluted?: The Emergence of a Human Right to a Healthy Environment Under International Law*, 16 TUL. ENVTL L.J. 65, 68 (2002).

<sup>74</sup> U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on Prevention of Discrimination & Prot. of Minorities, *Final Report on Human Rights and the Environment*, U.N. Doc. E/CN.4/Sub.2/1994/9 at 74–75 (July 6, 1994) (prepared by Fatma Zohra Ksentini).

<sup>75</sup> LILLICH ET AL., *supra* note 57, at 103.

protection.”<sup>76</sup> Nearly all global and regional human rights bodies have commented or legislated on links between environmental degradation and internationally protected human rights.<sup>77</sup> 117 nations include protection of environmental resources in their constitutions; 109 specify the right to a healthy environment and/or the nation’s obligation to prevent environmental harm.<sup>78</sup> Sixteen nations name an explicit right to information about health of the environment and/or about activities that may impair that health.<sup>79</sup> Article 24 of the African Charter on Human and Peoples’ Rights guarantees that “[a]ll peoples shall have the right to a general satisfactory environment favorable to their development,”<sup>80</sup> and Article 11 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights affirms that “[e]veryone shall have the right to live in a healthy environment and to have access to basic public services,” and requires that “[t]he States Parties shall promote the protection, preservation and improvement of the environment.”<sup>81</sup> National governments’ commitments to a clean environment as a human right expand every year; for example, in 2005, France passed an “Environment Charter,” which proclaims, among other provisions, that all citizens have a right “to live in an environment which is balanced and respects their health.”<sup>82</sup>

The human right to a clean environment may be expressed as a separate codified right, or as a necessary corollary to other fundamental rights. The former might name an explicit right to a healthy environment, clean water, or a functioning ecosystem.<sup>83</sup> But international conventions also recognize that environmental resources like “clean water” are essential to other protected rights,

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<sup>76</sup> EARTHJUSTICE, ENVIRONMENTAL RIGHTS REPORT: HUMAN RIGHTS AND THE ENVIRONMENT 1 (2005), available at [http://www.earthjustice.org/library/references/2005\\_ENVIRONMENTAL\\_RIGHTS\\_REPORTrev.pdf](http://www.earthjustice.org/library/references/2005_ENVIRONMENTAL_RIGHTS_REPORTrev.pdf).

<sup>77</sup> LILLICH ET AL., *supra* note 57, at 103.

<sup>78</sup> EARTHJUSTICE, *supra* note 76, at 37.

<sup>79</sup> *Id.* at 38.

<sup>80</sup> African Charter on Human and Peoples’ Rights art. 24, June 27, 1981, 21 I.L.M. 58, 63.

<sup>81</sup> Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, “Protocol of San Salvador” art. 11, Nov. 17, 1988, 28 I.L.M. 161, 165.

<sup>82</sup> EARTHJUSTICE, *supra* note 76, at 38–39.

<sup>83</sup> *E.g.*, S. AFR. CONST. 1996, § 24(a) (“Everyone has the right to an environment that is not harmful to their health or well-being.”).

such as the rights to life, health, work, culture, or development.<sup>84</sup> For example, the 1972 U.N. Conference on the Human Environment resulted in the Stockholm Declaration, whose Principle 1 proclaims that “[m]an [sic] has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.”<sup>85</sup> Early in the movement to establish Environmental Human Rights, Klaus Toepfer, Executive Director of the United Nations Environment Programme, declared that:

Human rights cannot be secured in a degraded or polluted environment. The fundamental right to life is threatened by soil degradation and deforestation and by exposures to toxic chemicals, hazardous wastes and contaminated drinking water. . . . Environmental conditions clearly help to determine the extent to which people enjoy their basic rights to life, health, adequate food and housing, and traditional livelihood and culture. It is time to recognize that those who pollute or destroy the natural environment are not just committing a crime against nature, but are violating human rights as well.<sup>86</sup>

In a 1998 International Court of Justice Opinion, Justice Weeramantry notes that:

The protection of the environment is likewise a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments.<sup>87</sup>

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<sup>84</sup> EARTHJUSTICE, *supra* note 76, at 12–13, 31.

<sup>85</sup> U.N. Conference on the Human Environment, *Final Declaration*, principle 1, U.N. Doc. A/CONF. 48/14 (June 16, 1972). Note that Principle 21 can be read as a contradictory clawback, as it states that “[s]tates have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.” *Id.*

<sup>86</sup> LILLICH ET AL., *supra* note 57, at 61.

<sup>87</sup> Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia), 1997 I.C.J. 85, 91–92 (Sept. 25) (separate Opinion of Vice-President Weeramantry).

When the United Nations Sub-Commission on the Promotion and Protection of Human Rights passed a resolution on “Promotion of the realization of the right to drinking water and sanitation,” it declared that the right to water is both a separate human right, and is also a necessary corollary to other human rights.<sup>88</sup> Sounding much like a modern day, expanded formulation of the Public Trust Doctrine, the resolution averred that because access to clean water is a fundamental human right, neither public nor *private* entities could restrict access to drinking water, and public authorities had an affirmative duty to maintain access to drinking water for all citizens.<sup>89</sup>

As in the Public Trust Doctrine, this approach to environmental protection is not about rights *of* the environment, but rights of humans *to* various environmental protections.<sup>90</sup> This may include provisions for future generations to enjoy certain rights, or even to ensure the very survival of future generations: according to Professor Dinah Shelton, “[a] right to environment thus implies significant, constant duties toward persons not yet born.”<sup>91</sup> While some biocentric or ecocentric environmental activists may use either the Public Trust Doctrine or Environmental Human Rights to protect ecological assets themselves from human despoliation, both doctrines are fundamentally homocentric.<sup>92</sup> Furthermore, some of the rights subsumed under the aegis of Environmental Human Rights—e.g., the right to development, or the right to clean water—may come into conflict with other “intrinsic” rights of the natural world, or other approaches to preserving nature for nature’s own sake.<sup>93</sup>

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<sup>88</sup> EARTHJUSTICE, *supra* note 76, at 12.

<sup>89</sup> *Id.*

<sup>90</sup> Dinah Shelton, *Human Rights, Environmental Rights, and the Right to Environment*, 28 STAN. J. INT’L L. 103, 117 (1991).

<sup>91</sup> *Id.* at 134; see, e.g., CONSTITUTION OF THE REPUBLIC OF MALAWI ch. III, art. 13(d)(iii) (“accord[s] full recognition to the rights of future generations by means of environmental protection and the sustainable development of natural resources”).

<sup>92</sup> See Shelton, *supra* note 90, at 109, 117. Atapattu sees the rights approach as complementing an ecocentric approach, because it “gives the victims of environmental abuse another avenue to seek redress. Atapattu, *supra* note 73, at 67. For some critiques of this homocentric approach see *id.* at 71–72, 78.

<sup>93</sup> Shelton, *supra* note 90, at 109; Atapattu, *supra* note 73, at 117–18. For a full treatment of “intergenerational equity,” the idea that each generation inherits a legacy it holds as a public trust for generations to come, see EDITH BROWN WEISS, IN FAIRNESS TO FUTURE GENERATIONS: INTERNATIONAL LAW, COMMON

Cases brought under the aegis of a human rights based approach to prevent environmental degradation have also emphasized rights of information and participation.<sup>94</sup> While Shelton observes that naming environmental “[i]ndividual rights may thus significantly limit the political will of a democratic majority, as well as a dictatorial minority,”<sup>95</sup> we can also see this as promoting an expansive view of democracy. Recall that Joseph Sax’s vision for the Public Trust Doctrine included a fundamental procedural right for affected members of the public to appeal directly government decisions that compromised resources held in the public trust, to protect trust resources held for the majority from incursions by a minority.<sup>96</sup> Various declarations and statutes promoting Environmental Human Rights have stressed similar procedural rights, including, for example, a right to information (both a right to request information and an affirmative duty of governments to provide information) when government bodies make decisions affecting the environment.<sup>97</sup>

Thus often linked to a fundamental environmental human right we find the right to participate in decisions affecting those rights, and to appeal decisions if one’s rights have been abridged. Currently signed by 40 nations as well as the European Community, the United Nation’s Economic Commission for Europe’s Aarhus Convention for “Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters” is the most extensive elaboration of this right. Its preamble declares that “every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations.”<sup>98</sup> The Aarhus Convention links the fundamental right to a clean environment with the fundamental right to acquire information about environmental matters, to participate in decision-making on those matters, and to vindicate

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PATRIMONY, AND INTERGENERATIONAL EQUITY (1992).

<sup>94</sup> LILLICH ET AL., *supra* note 57, at 103.

<sup>95</sup> Shelton, *supra* note 90, at 107.

<sup>96</sup> See Sax, DEFENDING, *supra* note 12, at 235.

<sup>97</sup> EARTHJUSTICE, *supra* note 76, at 7.

<sup>98</sup> Convention for Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, June 25, 1998, 2161 U.N.T.S. 450, 450, available at <http://www.unece.org/env/pp/documents/cep43e.pdf>. See also EARTHJUSTICE, *supra* note 76, at 16.

violations of environmental rights.<sup>99</sup>

Where Environmental Human Rights are justiciable (as in South Africa and India, below), individuals may have standing to bring cases when their own environmental rights have been violated.<sup>100</sup> Outsiders are also permitted—sometimes required—to bring cases on behalf of those who lack resources or freedoms to vindicate their own rights.<sup>101</sup> Not only may individuals whose rights are abridged challenge these actions; other nation states or transnational actors (e.g., the UN, intraregional organizations, NGOs) may actively intervene against national, corporate, or private actors to protect Environmental Human Rights.<sup>102</sup> For example, in the Niger River delta, international NGOs forced Nigeria to take measures (e.g., stop attacks on local communities, conduct investigations, compensate victims, prepare environmental, and social impact assessments) to remedy Environmental Human Rights violations from oil exploration.<sup>103</sup> The African Human Rights Commission explicitly thanked the NGOs for bringing the suit.<sup>104</sup>

### C. *The United States and Environmental Human Rights*

The United States offers no constitutionally protected right to the environment, despite three unsuccessful amendment attempts between 1967–1970, and renewed efforts in 2003.<sup>105</sup> However, six states do guarantee their citizens a right to a clean environment,<sup>106</sup> and I will explain below how this right has been incorporated in

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<sup>99</sup> EARTHJUSTICE, *supra* note 76, at 16.

<sup>100</sup> LILlich ET AL., *supra* note 57, at 100.

<sup>101</sup> See Jonas Ebbesson, *Public Participation*, in THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 694 (Daniel Bodansky, Jutta Brunée, & Ellen Hey, eds., 2007); LILlich ET AL., *supra* note 57, at 100. See, e.g., *infra* note 103.

<sup>102</sup> LILlich ET AL., *supra* note 57, at 103; see Ebbesson, *supra* note 101.

<sup>103</sup> Soc. & Econ. Rights Action Ctr. v. Nigeria, African Comm'n on Human & Peoples' Rights, Comm. No. 155/96 (2001), available at <http://www.umn.edu/humanrts/africa/comcases/155-96.html>.

<sup>104</sup> *Id.* ¶ 49.

<sup>105</sup> David W. Orr, *Law of the Land*, ORION, Jan.–Feb. 2004, at 19, 22. In 2003, Rep. Jesse Jackson Jr. introduced a constitutional amendment respecting “a right to a clean, safe, and sustainable environment.” H.R.J. Res. 33, 108th Cong. (2003).

<sup>106</sup> See Araiza, *supra* note 41, at 445. HAW. CONST. art. XI, § 9; ILL. CONST. art. XI, § 2; MASS. CONST. amend. XLIX; MONT. CONST. art. II, § 3; PA. CONST. art. 1, § 27; R.I. CONST. art. 1, § 17.

the courts of Pennsylvania, the state with the most elaborately developed jurisprudence on the right to a healthy environment.

The courts of many nations have universal jurisdiction to hear violations of generally recognized principles of human rights, even if those violations occur outside the nation's borders. This jurisdiction is usually reserved for violations of the most serious human rights crimes, considered to undermine the international legal order if left unremedied.<sup>107</sup> The United States offers no similar universal jurisdiction. Despite the oft-cited quote from the chestnut *Paquete Habana* case that "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination,"<sup>108</sup> plaintiffs seldom invoke international law in United States courts, and the courts have rarely held that an American entity violating *jus cogens* norms may be liable without empowering domestic legislation.<sup>109</sup> That is to say, rights widely recognized in international law do not by themselves create a right of action in the United States.

Environmental Human Rights are most likely to play out at the United States national level through application of the Alien Tort Statute of 1790, which has been held to create specific causes of action in United States federal courts for crimes that are universally recognized violations of human rights committed against aliens in foreign locations, when the perpetrator is found and served in the United States.<sup>110</sup> Originally created to allow courts to hear cases of piracy on the high seas, modern day crimes actionable under the Alien Tort Statute must be for crimes analogous to piracy, i.e., violations of rights that are "universally accepted norms of the international law of human rights"<sup>111</sup> as determined through "the works of jurists," "general usage and

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<sup>107</sup> Diane Orentlicher, *Whose Justice? Reconciling Universal Jurisdiction with Democratic Principles*, GEO. L.J. 1057, 1059–60 (2004); Menno Kamminga, *Lessons Learned from the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses*, 23 HUM. RTS. Q. 940, 943. Thus violations of economic, social, and cultural rights tend not to be subject to universal jurisdiction.

<sup>108</sup> *The Paquete Habana*, 175 U.S. 677, 700 (1900).

<sup>109</sup> See Joan Fitzpatrick, *The Role of Domestic Courts in Enforcing International Human Rights Law*, in LILLICH ET AL., *supra* note 57, at 477–78.

<sup>110</sup> *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

<sup>111</sup> *Id.* at 878.

practice of nations,” or “judicial decisions recognizing and enforcing that law.”<sup>112</sup> These crimes must have a high degree of specificity and must be broadly adhered to by nations.<sup>113</sup>

Broad consensus holds that these crimes include genocide, slavery, torture, and perhaps apartheid and aggressive warfare.<sup>114</sup> However, the court in *Sosa* specifically did not limit crimes actionable under the Alien Tort Statute to these crimes.<sup>115</sup> U.S. courts have, up until recently, not ruled environmental crimes as justiciable under the Alien Tort Statute; for example, in a case alleging personal injuries from pollution from a U.S. mining operation in Peru, a federal court held that rights to life and health are not definite enough to constitute a universally recognized norm of international law.<sup>116</sup> However, in August 2006, the Ninth Circuit Court of Appeals ruled that certain environmental harms—specifically racially discriminatory environmental harms and violations of the United Nations Convention on the Law of the Sea—could meet the *Sosa* court’s definitions for crimes that are actionable under the Alien Tort Statute.<sup>117</sup>

Thus international consensus consolidating around Environmental Human Rights could create powerful new legal tools in the United States, either through the Alien Tort Statute, or possibly through precedent establishing violations of *jus cogens* norms as actionable in courts. Below I will discuss the implications for recognition of Environmental Human Rights for United States notions of “private property” and for what constitutes a taking.

### III. SYNTHESIS AND SYNERGY BETWEEN THE PUBLIC TRUST DOCTRINE AND ENVIRONMENTAL HUMAN RIGHTS

The Public Trust Doctrine is a forerunner of the movement to

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<sup>112</sup> *Id.* at 880.

<sup>113</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004).

<sup>114</sup> See RESTATEMENT, *supra* note 70, § 102 reporters’ note 6.

<sup>115</sup> *Sosa*, 542 U.S. at 732.

<sup>116</sup> *Flores v. S. Peru Copper Corp.*, 343 F.3d 140, 160 (2d Cir. 2003).

<sup>117</sup> *Sarei v. Rio Tinto, PLC*, 456 F.3d 1069, 1074 (9th Cir. 2006). In a rehearing, the court held that racial discrimination was a *jus cogens* norm. *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1209 (9th Cir., 2007). The rehearing assumed “that UNCLOS reflects customary international law norms actionable under the ATCA,” even if they are not yet clearly *jus cogens* norms. *Id.* at 1210.



guarantee certain environmental rights as fundamental human rights. The Public Trust Doctrine is both an appealing idea that lays the groundwork for Environmental Human Rights, and a venerable legal doctrine that has historically managed to protect certain resources for public use, and may still be called upon to protect those resources in the name of Environmental Human Rights. Justinian's intuition about where the sovereign fit in the relationship between his citizens and his Empire's natural resources finds new, cogent, urgent expression in Environmental Human Rights. In Sax's justification of the Public Trust Doctrine, some public interests in the environment are intrinsically important, the gifts of nature's bounty ought not be constrained for private use, and some uses of nature are intrinsically inappropriate.<sup>118</sup> Those who advocate for Environmental Human Rights cite these same justifications, too. Clean water or clean air or functioning ecosystems are *rights* because human life cannot exist without them; these gifts of nature's bounty ought not be traded away for the use of private entities at the expense of what is essential to every single human's life.

But I believe that Environmental Human Rights is more than just putting old Public Trust Doctrine wine in gleaming new bottles. Once we label something as a fundamental right or an inviolable *right*, it is much less likely to come up short in a balancing test. Sax indicates that Public Trust Doctrine "rights" can be traded away, and even constitutionally based rights sometimes can be lost. The more fundamental the *right* is considered, the more nonderogable are duties to protect those *rights*, and the heavier the weight of international shaming falls upon the violator. Fulfillment of these *rights* supervenes any legislation that conflicts with such fulfillment.

Environmental Human Rights create more duties of each individual and the sovereigns who serve them not only not to usurp resources that are the object of these rights, but to affirmatively protect the natural objects and processes that form the basis of the rights. This means greater legislative and executive impetus to protect and advance these rights, and heightened judicial scrutiny when fundamental rights are violated. And Environmental Human Rights dramatically expand the body of plaintiffs, defendants, and intervenors who may vindicate the right or be charged with

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<sup>118</sup> See Sax, *Public Trust Doctrine*, *supra* note 9, at 484-85.

abridging the right. While the Public Trust Doctrine's reach tends to be limited to the boundaries of a state or nation, Environmental Human Rights reach across national boundaries in terms of who may bring claims against which violators, who may intervene to vindicate those rights, and who can have jurisdiction to hear violations of fundamental rights.

Under the Public Trust Doctrine, certain resources are understood to remain in public hands and cannot be conveyed to private uses. This idea has skulked about for 1500 years and has spread throughout common law and civil law traditions. A growing body of Public Trust Doctrine case law has accreted since the 19th century in the United States. Thus private property owners ought to be on notice that they may not arrogate public trust environmental resources. As an emerging norm in customary international law that is codified in ever more numerous documents in more and more corners of the world, Environmental Human Rights have enormous potential to create new prohibitions on what a private property owner may do with her land. It may not matter that a private property owner should be on notice (or whether or not she had reasonable "investment-backed expectations"<sup>119</sup>) about what she can do with her land.

If environmental rights become constitutionally or statutorily protected, if they are acknowledged as customary international law, or if they come to be taken as seriously as other *jus cogens* rights (e.g., rights to be free from torture or slavery), they can proscribe uses of private property that conflict with fulfilling those rights. And some of these rights—the right to clean water, the right to a healthy environment—are so sweeping they could dramatically constrain what an "owner" can do in the name of private property. If taken seriously, could a farmer continue to spray pesticides or allow topsoil erosion if this pollutes the water I drink or the air I breathe? Could factories continue to emit any kind of toxics or emit greenhouse gases?

In my Conclusion, I will speculate on the future of private property and "takings" of such property. I will do so in light of how the synergism between the Public Trust Doctrine and Environmental Human Rights has played out in the courts and legislatures of four disparate jurisdictions: India, South Africa, California, and Pennsylvania. In each, advocates and judges have

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<sup>119</sup> Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

marshaled the two doctrines as legal resources that help stake out the public's right to environmental resources and the government's obligations to steward those resources.

### A. *India*

Article 21 of India's constitution declares: "No person shall be deprived of his life or personal liberty except according to procedure established by law."<sup>120</sup> Laws that conflict with or abridge fundamental rights named in the constitution are voided.<sup>121</sup> Citizens are allowed to challenge violations of these rights directly, and in fact citizen suits are the most rapid means to challenge actions that threaten fundamental rights.<sup>122</sup> In India, Judges have taken these substantive and procedural rights seriously and have buttressed them by establishing the Public Trust Doctrine to secure powerful protections for citizens' Environmental Human Rights.

While India's constitution does not explicitly provide for Environmental Human Rights, Indian courts have gone further than almost any in naming environmental rights that serve the fundamental right to life.<sup>123</sup> In India, claims that impinge on Article 21's fundamental right to life include various challenges where ecosystems have been impaired.<sup>124</sup> India's Supreme Court stopped unauthorized mining causing environmental damage, holding that this "is a price that has to be paid for protecting and safeguarding the right of the people to live in a healthy environment with minimal disturbance of ecological balance."<sup>125</sup> When a government agency action threatened a local fresh water source, the High Court of Kerala held that government "cannot be permitted to function in such a manner as to make inroads into the fundamental right under Art. 21. . . . [T]he right to sweet water and the right to free air are attributes of the right to life, for these are the basic elements which sustain life itself."<sup>126</sup> In a case

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<sup>120</sup> INDIA CONST. art. 21.

<sup>121</sup> INDIA CONST. art. 13(2).

<sup>122</sup> RAZZAQUE, *supra* note 60, at 63, 67.

<sup>123</sup> Hill et al., *supra* note 72, at 382.

<sup>124</sup> Neal A. Kernkar, *Environmental Peacemaking: Ending Conflict Between India and Pakistan on the Siachen Glacier Through the Creation of a Transboundary Peace Park*, 25 STAN. ENVTL. L.J. 67, 86 (2006).

<sup>125</sup> Rural Litig. & Entitlement Kendra v. State of Uttar Pradesh, A.I.R. 1985 S.C. 652, 656 (India).

<sup>126</sup> Attakoya Thangal v. Union of India, A.I.R. 1990 K.L.T. 580 ¶ 7 (Kerala H.C.).

upholding a statute that allows India to pursue justice following the Bhopal disaster, the Supreme Court further consolidated the link between Article 21's right to life and the right to a clean environment.<sup>127</sup>

In 1997, the landmark case of *M.C. Mehta vs. Kamal Nath* conjured up the Public Trust Doctrine in India.<sup>128</sup> In that case, the Minister of the Environment (respondent here) impermissibly allowed a motel to be built at the mouth of a river, and impermissibly allowed the motel to change the course of the river (which created subsequent flooding in nearby villages) in violation of the Public Trust Doctrine—which hadn't explicitly existed before this case.<sup>129</sup> Before invoking the Public Trust Doctrine, the court alludes to:

the classic struggle between those members of the public who would preserve our rivers, forests, parks and open lands in their pristine purity and those charged with administrative responsibilities who, under the pressures of the changing needs of an increasingly complex society, find it necessary to encroach to some extent upon open lands heretofore considered inviolate to change.<sup>130</sup>

In this case, the court summons up the Public Trust Doctrine by first saying "[t]he notion that the public has a right to expect certain lands and natural areas to retain their natural characteristic is finding its way into the law of the land."<sup>131</sup> To justify this notion, the court cites excerpts from United States law review articles promoting a new kind of natural law exigency for protecting environmental resources in the name of protecting fundamental human rights.<sup>132</sup> For example, the court cites a lengthy passage from a *Harvard Environmental Law Review* article: "[H]uman activity finds in the natural world its external limits. In short, the environment imposes constraints on our freedom; these constraints are not the product of value choices but of the scientific imperative of the environment's limitations."<sup>133</sup>

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<sup>127</sup> Charan Lal Sahu v. Union of India, A.I.R. 1990 S.C. 1480, 1551 (India).

<sup>128</sup> 1997 1 S.C.C. 388, 388 (India).

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at ¶ 35.

<sup>131</sup> *Id.* at ¶ 23.

<sup>132</sup> *E.g., id.* at ¶ 23.

<sup>133</sup> *Id.* (citing David B. Hunter, *An Ecological Perspective on Property: A Call for Judicial Protection of the Public's Interest in Environmentally Critical*

The court then revisits Justinian's notion of the Public Trust Doctrine, as explained by Sax, including his exegesis of more than a half dozen seminal cases of United States law that invoked and reinvigorated the Public Trust Doctrine.<sup>134</sup> The court concludes:

Our legal system—based on English common law —includes the public trust doctrine as part of its jurisprudence. The State is the trustee of all natural resources which are by nature meant for public use and enjoyment. Public at large is the beneficiary of the sea-shore, running waters, airs, forests and ecologically fragile lands. The State as a trustee is under a legal duty to protect the natural resources. These resources meant for public use cannot be converted into private ownership.<sup>135</sup>

And thus the “esthetic use and the pristine glory of the natural resources, the environment and the eco-systems of our country cannot be permitted to be eroded for private, commercial or any other use unless the courts find it necessary, in good faith, for the public goods and in public interest to encroach upon the said resources.”<sup>136</sup> The court declares that “[t]he Public Trust Doctrine as discussed by us in this judgment is a part of the law of the land.”<sup>137</sup>

In *M.I. Builders Pvt. Ltd. v. Radhey Shyam Sahu*, the Indian Supreme Court subsequently hitched the Public Trust Doctrine to the constitutionally guaranteed right to life.<sup>138</sup> The court held that a public park and market are public trust resources that may not be replaced with a shopping complex.<sup>139</sup> Citing the precedent of *M.C. Mehta*, the court reasserted that the Public Trust Doctrine is part of Indian law,<sup>140</sup> and thus ordered the appellant to restore the park that it had destroyed when it (and the government agency that permitted its actions) improperly violated the public trust.<sup>141</sup> The park in a crowded area is of “historical importance and environmental necessity.”<sup>142</sup> To allow the construction would

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*Resources.* 12 HARV. ENVTL. L. REV. 311 (1988)).

<sup>134</sup> *Id.* at ¶¶ 24–25.

<sup>135</sup> *Mehta*, (1997) 1 S.C.C. at ¶ 34.

<sup>136</sup> *Id.* at ¶ 35.

<sup>137</sup> *Id.* at ¶ 39.

<sup>138</sup> See *M.I. Builders Pvt. Ltd. v. Radhey Shyam Sahu*, 1999 S.C.C. 464 (India).

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 506.

<sup>141</sup> *Id.* at 530.

<sup>142</sup> *Id.* at 466.

mean that citizens “would be deprived of the quality of life to which they are entitled under the law.”<sup>143</sup> Because the government’s Development Authority was the trustee of the park, it had violated “the doctrine of public trust, which [is] applicable in India.”<sup>144</sup> The government authority was obliged to manage this park for the public good, and it “has deprived itself of its obligatory duties which cannot be permitted.”<sup>145</sup>

The court noted that “this public trust doctrine in our country, it would appear, has grown from Article 21 of the Constitution.”<sup>146</sup> That is to say, in India, the Public Trust Doctrine was invoked anew specifically to protect the fundamental human rights enshrined in the Indian Constitution.

Here, then, the Indian Supreme Court avers that the actions of the government and the private party appellant violated the right to life guaranteed in Article 21 of the Indian Constitution, and the government agency has committed these violations by violating India’s Public Trust Doctrine. Drawing on the *Illinois Central* decision to explain Sax’s central tenet of the Public Trust Doctrine, the Indian court recites that “[w]hen a state holds a resource which is available for the free use of the general public, a court will look with considerable skepticism upon any governmental conduct which is calculated either to reallocate the resource to more restricted uses or to subject public uses to the self-interest of private parties.”<sup>147</sup>

Subsequent Indian litigation has affirmed the Public Trust Doctrine’s relevance in Indian law. For example, the High Court of Jammu & Kashmir allowed a manufacturing plant to be constructed, but only if the regional government observed its Public Trust Doctrine duties to ensure that all possible pollution safeguards were implemented.<sup>148</sup> The decision once again said that Article 21 of the constitution required that the government observe its public trust duties, for the “public has a right to expect certain lands and natural areas to retain their natural

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<sup>143</sup> *Id.* at 480.

<sup>144</sup> *Id.* at 506.

<sup>145</sup> *Id.* at 506–07.

<sup>146</sup> *Id.* at 518.

<sup>147</sup> *Id.* at 518.

<sup>148</sup> *Th. Majra Singh v. Indian Oil Co.*, A.I.R. 1999 J & K 81, 83 *excerpted in* RAZZAQUE, *supra* note 60, at 105.

characteristics.”<sup>149</sup> The judgment also extended the scope of the Public Trust Doctrine, as “there can be no dispute that the State is under an obligation to see that forests, lakes and wildlife and environment are duly protected.”<sup>150</sup>

Even after reading these cases and various interpretations thereof, I do not understand how exactly the Indian Supreme Court pulled off this maneuver. The decisions do not reveal whether the judges are saying this Public Trust Doctrine has always been a part of Indian law, or whether it is a new provision. Mostly they seem to say that United States law has always found the Public Trust Doctrine to be part of *its* common law heritage as a British colony, and it should obtain in India, too. What is clear, however, is that the court felt the Public Trust Doctrine was necessary to bolster its demands on the government to advance constitutionally protected rights.

It also appears that putting the Public Trust Doctrine in service of constitutionally guaranteed environmental rights puts not only new strictures on government, but also places new constraints on private property rights in India. Those constraints could be cast as a sextuple threat to Indian private property rights. First, the Indian Constitution mandates a fundamental right to life. Second, two decades and dozens of court cases interpret this constitutionally provided right to mean that environmental harms themselves are proscribed in order to serve the fundamental right to life. Third, to prohibit private acts that threaten environmental resources essential to safeguard the right to life, the Indian Supreme Court has repeatedly cited the “polluter pays principle and the precautionary principle” as emerging norms of international environmental law.<sup>151</sup> Fourth, the Public Trust Doctrine is asserted to buttress the government’s ineluctable responsibility to protect the right to life and the ancillary rights that serve the fundamental right. Fifth, private rights of action against private or government parties are permitted to vindicate the fundamental and corollary rights. Finally, the Indian Constitution requires an affirmative “fundamental duty” of every citizen of India “to protect and improve the natural environment including

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<sup>149</sup> *Id.* at 82.

<sup>150</sup> *Id.*

<sup>151</sup> S. MURALIDHAR, INT’L ENVTL. LAW RESEARCH CTR., THE RIGHT TO WATER: AN OVERVIEW OF THE INDIAN LEGAL REGIME 6–7 (2006), *available at* <http://www.ielrc.org/content/a0604.pdf> (providing an overview of these cases).

forests, lakes, rivers, wild life, and to have compassion for living creatures.”<sup>152</sup> While a thorough examination of Indian private property rights is beyond the scope of this article, the combination of court-enshrined corollary environmental rights in service of fundamental right to life when accompanied with a decade-old reinvention of the Public Trust Doctrine means that whatever “rights” private property owners had before in India are now cast in a new, circumscribed way.

### B. *South Africa*

The constitution of the Republic of South Africa, ratified in 1996 after a long era of brutal, systemic racial oppression, is perhaps the most progressive constitution in the world today in terms of guaranteeing an expansive set of fundamental human rights, and in naming affirmative duties of a government to advance those rights.<sup>153</sup> Unlike in India, The Bill of Rights includes Section 24’s explicit, fundamental environmental rights:

Everyone has the right: a) to an environment that is not harmful to their health or well-being; and b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that: i) prevent pollution and ecological degradation; ii) promote conservation; and iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.<sup>154</sup>

The constitution further guarantees the right to “sufficient food and water.”<sup>155</sup> Just as Supreme Court Justices did in India, South Africa’s legislators have reintroduced the Public Trust Doctrine as part of national law, and as such have expanded dramatically the Environmental Human Rights of the public at the expense of individual rights of private property owners.

As separate rights, but also rights used to access other fundamental rights, all South Africans have the rights of “[a]ccess to information,”<sup>156</sup> “[j]ust administrative action,”<sup>157</sup> and “[a]ccess

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<sup>152</sup> INDIA CONST. art. 51A(g).

<sup>153</sup> See Jan Glazewski, *The Rule of Law: Opportunities for Environmental Justice in the New Democratic Legal Order*, in ENVIRONMENTAL JUSTICE IN SOUTH AFRICA 171–98 (David A. McDonald ed., 2001).

<sup>154</sup> S. AFR. CONST. 1996 § 24.

<sup>155</sup> S. AFR. CONST. 1996 § 27(1)(b).

<sup>156</sup> S. AFR. CONST. 1996 § 32.



to courts.”<sup>158</sup> The constitution gives broad standing to anyone to stake a claim when their constitutionally codified rights have been violated; this may be “anyone acting in their own interest,” “anyone acting on behalf of another person who cannot act in their own name,” “anyone acting as a member of, or in the interest of, a group or class of persons,” “anyone acting in the public interest,” or “an association acting in the interest of its members.”<sup>159</sup>

Various court decisions have held that all of these rights are to be read holistically; i.e., each right must be situated nonhierarchically in the context of all the rights named in the constitution and all rights should be interpreted through the national values the constitution was designed to promote.<sup>160</sup>

The case *The Government of the Republic of South Africa v. Irene Grootboom* illustrates the broad reach of these fundamental rights.<sup>161</sup> Desperately poor citizens were able directly to appeal their lack of housing, food, and water—which resulted in a “land invasion” by those attempting to secure basic needs—and the government’s abdication of its fundamental duties to provide them with these fundamental rights.<sup>162</sup> The court begins by noting the “harsh reality that the Constitution’s promise of dignity and equality for all remains for many a distant dream.”<sup>163</sup> Noting that Section 7(2) of the constitution “requires the state ‘to respect, protect, promote and fulfil the rights in the Bill of Rights’ and the courts are constitutionally bound to ensure that they are protected and fulfilled,” the court rules that it is beyond question that all the rights of the constitution are justiciable, and the only question remaining is “how to enforce them in a given case.”<sup>164</sup> The court explores “[t]he concept of minimum core obligation” where “[e]ach right has a ‘minimum essential level’ that must be satisfied

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<sup>157</sup> S. AFR. CONST. 1996 § 33.

<sup>158</sup> S. AFR. CONST. 1996 § 34.

<sup>159</sup> S. AFR. CONST. 1996 § 38.

<sup>160</sup> Robyn Stein, *Water Law in a Democratic South Africa: A Country Case Study Examining the Introduction of a Public Rights System*, 83 TEX. L. REV. 2167, 2170-71 (2004); see *The Gov’t of the Republic of South Africa & Others v Grootboom & Others* 2000 (11) BCLR 1169 (CC) ¶ 19 (S. Afr.) (a set of listed “rights need to be considered in the context of the cluster of socio-economic rights enshrined in the Constitution”).

<sup>161</sup> 2000 (11) BCLR 1169 (CC) (S. Afr.).

<sup>162</sup> *Id.* ¶¶ 2, 93.

<sup>163</sup> *Id.* ¶ 2.

<sup>164</sup> *Id.* ¶ 20.

by the states parties.”<sup>165</sup>

The government’s obligations to fulfill these rights are manifold. Legislation alone is not enough and must be “supported by appropriate, well-directed policies and programmes,” which themselves “must also be reasonably implemented.”<sup>166</sup> While the court acknowledges that these actions may be limited by available resources, the “nationwide housing programme falls short of obligations imposed upon national government to the extent that it fails to recognize that the state must provide for relief for those in desperate need.”<sup>167</sup> The court holds that the government is obliged “to provide access to housing, health-care, sufficient food and water, and social security to those unable to support themselves and their dependants. The state must also foster conditions to enable citizens to gain access to land on an equitable basis.”<sup>168</sup> The court appoints the Human Rights Commission, an *amicus* in the case, to monitor progress in meeting these goals, and to report back on results.<sup>169</sup> While the court acknowledges the “extremely difficult task for the state to meet these obligations in the conditions that prevail in our country,” the judge concludes: “I stress, however, that despite all these qualifications, these are rights, and the Constitution obliges the state to give effect to them.”<sup>170</sup>

This judgment implies that the state must affirmatively address and make progress towards achieving all the fundamental rights, including the environmental rights.<sup>171</sup> Section 24(a) notes that everyone has a right to an environment that is not only not harmful to their “health” but to their “well-being.”<sup>172</sup> While “health” is covered elsewhere in the constitution, one can claim many other aspects of one’s “well-being” that may be harmed when one’s environment is harmed. Professor Jan Glazewski writes: “In the environmental context, the possibilities suggested by a right to well-being are exciting, but potentially limitless. The words nevertheless encompass the essence of environmental

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<sup>165</sup> *Id.* ¶ 31.

<sup>166</sup> *Id.* ¶ 42.

<sup>167</sup> *Id.* ¶ 66.

<sup>168</sup> *Id.* ¶ 93.

<sup>169</sup> *Id.* ¶ 97.

<sup>170</sup> *Id.* ¶ 94.

<sup>171</sup> Stein confirms this; *supra* note 160, at 2171–72.

<sup>172</sup> S. AFR. CONST. 1996 § 24(a).

concern, namely a sense of environmental integrity; a sense that we ought to utilize the environment in a morally responsible and ethical manner.”<sup>173</sup> He and other scholars anticipate dramatic expansions of litigation in the name of vindicating the fundamental environmental rights.<sup>174</sup>

In 1998, to fulfill its constitutionally mandated affirmative duties to secure the right to water, supported here by the constitutionally mandated rights of “[a]ccess to information,” “[j]ust administrative action,” and “[a]ccess to courts,”<sup>175</sup> South Africa passed a National Water Act.<sup>176</sup> Decades of racial apartheid left over 10 million South Africans without access to clean, safe water and over 20 million South Africans without adequate sanitation.<sup>177</sup> The National Water Act requires distribution of basic water supplies to fulfill the constitutionally mandated right to water, but also requires the government to fulfill the constitutionally mandated duties to promote conservation and prevent ecological degradation through the mechanism of an environmental “reserve,” which conserves water for future human and current nonhuman use.<sup>178</sup>

As part of the National Water Act, in the same year that India’s Supreme Court mandated its Public Trust Doctrine, the South African government disinterred its own moribund Public Trust Doctrine, which had been buried through decades of apartheid regimes whose leaders felt no need to act to preserve resources for the majority of the public.<sup>179</sup> The National Government is “the public trustee of the nation’s water sources” and must “ensure that water is protected, used, developed, conserved, managed and controlled in a sustainable and equitable manner, for the benefit of all persons and in accordance with its

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<sup>173</sup> Glazewski, *supra* note 153, at 176.

<sup>174</sup> *Id.* at 193.

<sup>175</sup> S. AFR. CONST. 1996 §§ 32–34.

<sup>176</sup> National Water Act 36 of 1998 (S. Afr.), available at <http://www.elaw.org/resources/text.asp?ID=1153>. The Preamble to the Act parallels language in the Bill of Rights, which states that “[e]veryone has the right to have access to . . . sufficient . . . water.” S. AFR. CONST. 1996 § 27(1).

<sup>177</sup> DEP’T OF WATER AFFAIRS & FORESTRY, S. AFR., WHITE PAPER ON A NATIONAL WATER POLICY FOR SOUTH AFRICA § 2.2.3 (1997) [hereinafter WHITE PAPER], available at <http://www.dwaf.gov.za/Documents/Policies/nwppwp.pdf>.

<sup>178</sup> National Water Act §§ 16–18.

<sup>179</sup> Stein, *supra* note 160, at 2173.

constitutional mandate.”<sup>180</sup>

The White Paper that led to the National Water Law prepared the foundation for reinstituting the Public Trust Doctrine. As background, the Paper recites that:

In Roman law (on which South African law is based) rivers were seen as being resources which belonged to the nation as a whole and were available for common use by all citizens, but which were controlled by the state in the public interest. These principles fitted in well with African customary law which saw water as a common good used in the interest of the community.<sup>181</sup>

The White Paper further proclaims that:

The recognition of Government's role as custodian of the 'public trust' in managing, protecting and determining the proper use of South Africa's water resources . . . is a central part of the new approach to water management. As such it will be the foundation of the new water law. The main idea of the public trust is that the national Government has a duty to regulate water use for the benefit of all South Africans, in a way which takes into account the public nature of water resources and the need to make sure that there is fair access to these resources. The central part of this is to make sure that these scarce resources are beneficially used in the public interest.<sup>182</sup>

The White Paper refers to United States court precedents overturning private water rights “on the grounds that water remains subject to the public trust,” confirming the development of the public trust as including “the state's duty to protect the people's common heritage of rivers, streams, lakes, marshlands, tidelands and the sea-shore.”<sup>183</sup> The authors nonetheless state that “the idea of water as a public good will be redeveloped into a doctrine of public trust which is uniquely South African . . . .”<sup>184</sup> This means, among other things, that riparian allocations will not

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<sup>180</sup> National Water Act § 3(1).

<sup>181</sup> WHITE PAPER, *supra* note 177, § 5.1.1.

<sup>182</sup> *Id.* § 5.1.2.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* South Africa reaffirmed the Public Trust Doctrine in the National Environmental Management Act, which declares that the “environment is held in public trust for the people. [T]he beneficial use of environmental resources must serve the public interest and the environment must be protected as the people's common heritage.” Act 107 of 1998 Ch.1, § 2(4)(o), available at <http://www.info.gov.za/gazette/acts/1998/a107-98.pdf>.

carry permanent property rights, but will be “time limited” to allow for both the ebbs and flows of natural processes and the “evolving socio-economic demands placed on them.”<sup>185</sup> That is to say, the Public Trust Doctrine continues to allow reasonable use by riparians, but that use is always subject to government redistribution schemes.<sup>186</sup> Furthermore, “[c]laims, allocations and uses which are not beneficial in the public interest, have no basis in the common law, nor will they be recognized under the new law.”<sup>187</sup> New allocations may be “redressing the results of past racial discrimination.”<sup>188</sup>

Thus riparian rights will be reallocated to emphasize uses that help fulfill constitutional mandates for fundamental human rights, serve the public interest, and ameliorate allotments unjustly given during apartheid. When combined with the “Just Administration,” expanded standing, and other procedural rights codified in the constitution, the Public Trust Doctrine’s “uniquely South African” twist comes close to marrying Joseph Sax’s vision of intertwined substantive and procedural rights while curtailing certain property “rights” in water.

The policy adopted by South Africa to deliver “Free Basic Water”<sup>189</sup> to all its citizens is not without problems: allocated amounts are low (25 liters/day), the system is underfinanced, some local governments turn to profit-making corporations to deliver basic services, and despite the fact that local authorities are supposed to be guided by “compassion” in assessing rates, some poor families cannot afford the price.<sup>190</sup> Nonetheless, between the time the constitution was implemented in 1996 and 2002, South Africa managed to provide free basic water supplies to 27 million (of its approximately 44 million) people, and plans to achieve full compliance with their constitutionally mandated duty by providing

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<sup>185</sup> WHITE PAPER, *supra* note 177, § 5.1.2.

<sup>186</sup> Erik B. Bluemel, *The Implications of Formulating a Human Right to Water*, 31 *ECOLOGY L.Q.* 957, 999 (1999).

<sup>187</sup> WHITE PAPER, *supra* note 177, § 5.1.3.

<sup>188</sup> *Id.*

<sup>189</sup> DEP’T OF WATER AFFAIRS & FORESTRY, S. AFR., FREE BASIC WATER IMPLEMENTATION STRATEGY (VERSION 2) 3 (2002), available at <http://www.dwaf.gov.za/Documents/FBW/FBWImplementStrategyAug2002.pdf>.

<sup>190</sup> ALIX GOWLLAND-GUALTIERI, INT’L ENVTL. LAW RESEARCH CTR., SOUTH AFRICA’S WATER LAW AND POLICY FRAMEWORK: IMPLICATIONS FOR THE RIGHT TO WATER 5–8, 9 (2007).

free basic water to the entire population by 2009.<sup>191</sup>

It seems to me that South Africa reinvented the Public Trust Doctrine for several reasons. First, as we saw in India, the Public Trust Doctrine provides additional ideological and legal support for the government's assertion of control over environmental resources to which a nation's citizens have new, constitutionally mandated, and judicially reinforced fundamental human rights. In South Africa, the Public Trust Doctrine helps effectuate citizens' constitutional right to "[j]ust administrative action" (i.e., "[e]veryone has the right to administrative action that is lawful, reasonable, and procedurally fair"<sup>192</sup>). The Public Trust Doctrine provides international legal justification for newly expanded responsibilities and provides a body of international legal decisions to help guide a new democracy on the parameters and pitfalls of how government must act as public trustee. Asserting the Public Trust Doctrine helps avoid estoppel—or takings—arguments for those citizens whose current water allocations will be revoked: those allocations may be illegitimate not only because they were given under an illegal apartheid system, but because that system itself revoked the use of the Public Trust Doctrine, which ought always to have existed as common law in South Africa's Roman-derived legal system. By declaring that in South Africa, the Public Trust Doctrine always obtained—or always ought to have obtained—the current government can now say that those in power during the apartheid years impermissibly abandoned their duties as public trustee. The Public Trust Doctrine thus buttresses constitutionally required government action to protect constitutionally guaranteed fundamental environmental rights.

Implementing the Public Trust Doctrine may constrain private property ownership and actions as well. The constitution supports private property rights, and the government can only take property "for a public purpose or in the public interest," "subject to compensation;" however, compensation may be limited by "the history of the acquisition and use of the property."<sup>193</sup> Because the "public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's

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<sup>191</sup> Bluemel, *supra* note 186, at 979.

<sup>192</sup> S. AFR CONST. 1996 § 33.

<sup>193</sup> S. AFR CONST. 1996 § 25.

natural resources,”<sup>194</sup> owners who acquired private property illegally during apartheid may have no rights to keep that property, as “[n]o provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination.”<sup>195</sup> Furthermore, individuals have duties to protect fundamental environmental rights of their fellow citizens, and citizens have standing to challenge private actions that violate those environmental rights. The only case I have found to make this connection occurred while the interim constitution was supreme law. The court found that incineration at a sawmill resulted in “generation of smoke in these circumstances . . . [which] is an infringement of rights of the respondent’s neighbours to ‘an environment which is not detrimental to their health or well-being’ enshrined in the Interim Constitution.”<sup>196</sup> According to Glazewski, by so doing, the judge enshrined into law the maxim that one should “use your property in a way which does not harm another.”<sup>197</sup>

In South Africa, private property rights are circumscribed by requirements that owners adhere to the public trust, by new duties to promote fundamental human rights, and by the extent to which the property rights were fairly distributed or unfairly arrogated during an unjust system of racial oppression. Capricious water supplies needed to serve a population growing in size and needs—a supply the government *must* manage as public trustee to fulfill fundamental human rights—can only diminish the “rights” property holders currently enjoy. Compensation—akin to that paid for a taking—is available only when renewals are denied to those reapplying for licenses for uses that would, in fact, be beneficial to the public (and that were not impermissibly granted in the first place). When one adds up the constitutionally enshrined environmental rights, the duties the constitution imposes on the government, the public trust rights written into the National Water Act, and the aggressive decisions handed down by the courts in interpreting the constitution and resulting statutes, private property rights face a shrinking future in South Africa.

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<sup>194</sup> S. AFR CONST. 1996 § 25(4)(a).

<sup>195</sup> S. AFR CONST. 1996 § 25(8).

<sup>196</sup> *Minister of Health & Welfare v Woodcarb (Pty) Ltd. & Another* 1996 (3) SA 155 (S. Afr.), cited in Glazewski, *supra* note 153, at 176–77.

<sup>197</sup> Glazewski, *supra* note 153, at 177.

### C. California

In the United States, the Public Trust Doctrine applies to *state* resource policy. While rare exceptions exist,<sup>198</sup> few decisions have found that the Public Trust Doctrine applies to federal management of public trust resources.<sup>199</sup> Thus, we turn to state court decisions to see how the Public Trust Doctrine has evolved in modern United States jurisprudence.

Joseph Sax's dream of resurrecting the Public Trust Doctrine found marked fulfillment in California cases. The reach of these decisions extends internationally: passages were quoted both in the case that implemented the Public Trust Doctrine in India, and in the White Paper that reinstituted the Public Trust Doctrine in South Africa.<sup>200</sup> Legal scholars have offered extensive commentary on these cases; I will only summarize their holdings here, to show how the Public Trust Doctrine reemerged in the modern era, and to illustrate how its effects may be felt, particularly as *California courts have provided a robust interpretation of the Public Trust Doctrine that constrains the "rights" of private property owners.*

The California Constitution provides that the

right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water.<sup>201</sup>

This "right" is constrained. Subject to balancing demands, it is not a fundamental right in the way that Indian or South African constitutionally guaranteed environmental rights are framed, or in the way that a *jus cogens right* would be framed.

In *Marks v. Whitney*, the California Supreme Court held that the private owner of tidebanks in Tomales Bay had no right to

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<sup>198</sup> See *Sierra Club v. Dept. of Interior*, 398 F. Supp. 284, 293 (N.D. Cal. 1975) (holding that the Secretary of the Interior violated his trustee duties by failing to safeguard Redwood National Park from destructive timber operations. The decision makes no mention of the "public trust" or "Public Trust Doctrine.").

<sup>199</sup> ROBERT L. GLICKSMAN & GEORGE CAMERON COGGINS, *MODERN PUBLIC LAND LAW IN A NUTSHELL* 106–08 (3rd ed. 2006).

<sup>200</sup> *M.C. Mehta v. Kamal Nath*, 1997 (1) S.C.C. 388, 408–13 (India); see *WHITE PAPER*, *supra* note 177, at § 5.1.2.

<sup>201</sup> CAL. CONST. art. X, § 2.



develop these lands, and private citizens were entitled to protest such usurpation.<sup>202</sup> The court noted that the public was entitled to preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area.<sup>203</sup>

The court expands the public values whose realization the Public Trust Doctrine serves to protect.

This 1971 decision marks the re-emergence of the Public Trust Doctrine in California jurisprudence, and lays the groundwork for the landmark 1983 case *National Audubon Society v. Superior Court*, where the court affirmed the basic tenets of the Public Trust Doctrine.<sup>204</sup> Government may neither alienate nor allow avoidable injury of public trust resources by private parties, and government has a continuing duty to safeguard these resources for benefit of the public.<sup>205</sup> In this and subsequent public trust decisions, the California Supreme Court has followed a precedent dating back to *Illinois Central*, where the U.S. Supreme Court looked skeptically at any government action that might endanger public trust resources.<sup>206</sup>

In *National Audubon*, when Los Angeles exercised government-granted "rights" to divert water that would otherwise have flowed into Mono Lake, it caused extreme ecological degradation.<sup>207</sup> The court held that appropriative water rights are, and always have been, subject to the Public Trust Doctrine, which demands that the water right may be curtailed if protection of the public trust resource demands it.<sup>208</sup> Thus these water rights that may harm resources protected by the trust (which the court held applies to flowing inland waterways) cannot be vested as property rights.<sup>209</sup>

The court held that in rare cases, California officials may take into account a growing population's need for water resources and

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<sup>202</sup> Marks v. Whitney, 491 P.2d 374, 381 (Cal. 1971).

<sup>203</sup> *Id.* at 380.

<sup>204</sup> Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 728 (Cal. 1983).

<sup>205</sup> *Id.* at 727-28.

<sup>206</sup> See generally Ill. Cent. R.R. v. Illinois, 146 U.S. 387 (1892).

<sup>207</sup> Nat'l Audubon, 658 P.2d at 714-15.

<sup>208</sup> *Id.* at 727.

<sup>209</sup> *Id.*

allow uses of trust resources that harm those resources.<sup>210</sup> However, these officials also have an “affirmative duty to take the public trust into account” when balancing competing uses of trust resources.<sup>211</sup> Officials must continuously monitor private users who may potentially harm trust resources.<sup>212</sup>

As in *Marks v. Whitney*, the court emphasized that the Public Trust Doctrine has expanded to cover an enlarged set of natural assets. Here, an inland navigable waterway is protected from diversion of waters from nonnavigable tributaries.<sup>213</sup> Due to “the changing public perception of the values and uses of waterways,”<sup>214</sup> new values protected under the Public Trust Doctrine include “recreational and ecological” assets, such as “the scenic views of the lake and its shore, the purity of the air, and the use of the lake for nesting and feeding by birds.”<sup>215</sup> In sum, property rights in public trust assets are revocable, the government has an affirmative duty to protect those rights, and the range of public trust assets expand as modern ecological values expand.

The court reviews and applies precedent cases that deny takings compensation because no one can acquire vested rights to appropriate water in a way that violates “reasonable use,” i.e., in a way that harms public trust resources.<sup>216</sup> Thus title may not necessarily be revoked, but title is conditioned on water rights being managed to protect (expanding) values and assets deemed to be covered under the Public Trust Doctrine.<sup>217</sup> The property here seems less like a vested right and more like a revocable easement.

Professor Brian Gray describes the difficulty of winning takings claims in California water cases.<sup>218</sup> When California changes the elements of a water “right,” it is not retrospectively and impermissibly redefining what constitutes the property right in water.<sup>219</sup> Rather, California has always granted such “rights” “in a

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<sup>210</sup> *Id.* at 724, 727.

<sup>211</sup> *Id.* at 728.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at 721.

<sup>214</sup> *Id.* at 719.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* at 725.

<sup>217</sup> *Id.* at 722–23, 727.

<sup>218</sup> See Brian E. Gray, *The Property Right in Water*, 9 HASTINGS W.-NW. J. ENVTL. L. & POL’Y 1 (2002).

<sup>219</sup> *Id.* at 14–16.

manner that allows the state to continually reevaluate both the exercise of the right and the property right in water based on evolving and contemporary judgments of what is reasonable under the circumstances.”<sup>220</sup> Thus these water rights “are—and always have been—fragile.”<sup>221</sup>

As California’s population grows and water resources become scarcer (due to increased demand exacerbated, perhaps, by climate change-induced scarcity), it is easy to envision that the concept of the public trust may evolve to restrict further what property owners—either of water rights or of some forms of real property—may do with their property. Californians have, as of yet, no constitutionally mandated right to a clean environment or to clean water. If citizens demand such rights (presumably through a successful ballot initiative), as we see elsewhere, it could further restrict what private property owners are permitted to do. Such restrictions would be further legitimized because the government would be acting to effect the direct will of the people, as expressed in the constitutionally granted right.

#### D. *Pennsylvania*

Two-thirds of state constitutions in the United States afford some protections for natural resources<sup>222</sup> and, as noted above, six states have constitutional provisions that confer environmental rights to individuals.<sup>223</sup> Unlike the far-reaching implications of constitutional provisions in India and South Africa, these provisions have not been as effective—in protecting environmental resources, in protecting citizens’ rights to access those resources, in fomenting additional duties of government in fulfilling its public trust responsibilities—as framers of these constitutional amendments would have liked.<sup>224</sup> The litany of shortcomings include environmental plaintiffs’ unwillingness to use the provisions; courts’ decisions that the provisions are not self executing, i.e., they do no independent legal work without explicit legislation enabling the provisions; legislators’ reluctance to pass enabling legislation; and courts’ reluctance to extend standing

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<sup>220</sup> *Id.* at 16.

<sup>221</sup> *Id.*

<sup>222</sup> Araiza, *supra* note 41, at 438.

<sup>223</sup> *Id.* at 445.

<sup>224</sup> See Matthew Thor Kirsch, Note, *Upholding the Public Trust in State Constitutions*, 46 DUKE L.J. 1169, 1171–72 (1997).

provisions to citizen plaintiffs to vindicate their constitutional rights.<sup>225</sup>

A scholar points out that states that have successfully wielded their constitutional provisions to achieve increased environmental protections have all in some way codified pre-existing Public Trust Doctrines.<sup>226</sup> A thorough examination of these six states' experiences is beyond the scope of this article; however, scholars consider the Pennsylvania constitutional provision "the most prominent environmental amendment to a state constitution."<sup>227</sup> It is instructive to see how that provision has fared in securing public environmental rights or in affecting private property rights there.

In 1971, Pennsylvania voters approved an environmental amendment that incorporates Pennsylvania's Public Trust Doctrine as part of the state constitution.<sup>228</sup> Article 1, Section 27 reads:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.<sup>229</sup>

In approving this amendment, voters provided a democratic basis for the Public Trust Doctrine, sometimes criticized as being anti-democratic.<sup>230</sup> Yet Pennsylvania courts have been split on what to make of the constitutionalization of the Public Trust Doctrine. Pennsylvania's judges have been quite cautious in extending the reach of the environmental rights amendment. But as an explicit constitutional codification of the Public Trust Doctrine, the amendment has provided state and local governments

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<sup>225</sup> *Id.* at 1171.

<sup>226</sup> *Id.* at 1173.

<sup>227</sup> John C. Dernbach, *Taking the Pennsylvania Constitution Seriously When it Protects the Environment: Part I—An Interpretive Framework for Article 1, Section 27*, 103 DICK. L. REV. 693, 697–98 (1999).

<sup>228</sup> *Id.* at 695; Joseph W. Dellapenna, *Developing a Suitable Water Allocation Law for Pennsylvania*, 17 VILL. ENVTL. L.J. 1, 81 (2006).

<sup>229</sup> PA. CONST. art. 1, § 27.

<sup>230</sup> Kirsch, *supra* note 224, at 1176 (citing James L. Huffman, *Trusting the Public Interest to Judges: A Comment on the Public Trust Writings of Professors Sax, Wilkinson, Dunning and Johnson*, 63 DENV. U. L. REV. 565, 583 (1986) (saying the doctrine is a tool "for political losers or for those seeking to avoid the costs of becoming political winners")).

an additional bulwark for shoring up legislation that helps fulfill their stewardship duties over public trust resources and helps them avoid takings claims when such legislation constrains private property rights.

A court held that the amendment provides a self-executing right when the government enjoins private actions that threaten the public's trust assets.<sup>231</sup> When the state challenged construction of a tall tower near Gettysburg National Military Park, Pennsylvania's intermediate appellate court agreed that the amendment clearly invokes the government's ability to act as a trustee to protect named environmental rights, and noted that since private parties are responsible for much environmental degradation, the government as public trustee must be able to challenge private parties' threats to protected resources.<sup>232</sup>

However, in a sharply divided opinion, signed by only two justices, the Pennsylvania Supreme Court argued that the provision was not self-executing: the government, exercising its public trust duties, was not permitted to instigate actions against private individuals in the name of the constitutional amendment.<sup>233</sup> The court feared that state government officers would use the amendment to persecute individual property owners, and argued that to allow the government to act to vindicate public trust rights against private parties could raise numerous due process and equal protection violations.<sup>234</sup> (They did not mention takings.)

Furthermore, the court ruled that terms like "natural, scenic, historic and esthetic values" are vague and all encompassing, and that "clean air" and "pure water" required more technically precise definitions.<sup>235</sup> The court held that without supporting legislation, private property rights would be unduly threatened, as the "property owner would not know and would have no way, short of expensive litigation, of finding out what he could do with his property."<sup>236</sup> The court believed that codifying the Public Trust Doctrine as a constitutional amendment does no meaningful work

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<sup>231</sup> *Commonwealth v. Nat'l Gettysburg Battlefield Tower, Inc.*, 302 A.2d 886, 892 (Pa. Commw. Ct. 1973).

<sup>232</sup> *Id.*

<sup>233</sup> *Commonwealth v. Nat'l Gettysburg Battlefield Tower, Inc.*, 311 A.2d 588, 594-95 (Pa. 1973).

<sup>234</sup> *Id.* at 593.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

without supplemental legislation that executes the amendment.<sup>237</sup>

The dissenters agreed with the intermediate court, arguing that the amendment makes explicit the government's public trust responsibility.<sup>238</sup> The dissenters argued that

[t]his Court has been given the opportunity to affirm the mandate of the public empowering the Commonwealth to prevent environmental abuses; instead, the Court has chosen to emasculate a constitutional amendment by declaring it not to be self-executing.<sup>239</sup>

The dissent concludes that these rights are enumerated and should be self-executing against private individuals: "[t]he amendment thus installs the common law public trust doctrine as a constitutional right to environmental protection . . . ."<sup>240</sup>

Courts have considered the amendment self-executing when citizens challenge government officials, whose public trust duties the amendment clearly codifies.<sup>241</sup> In *Payne v. Kasab*, residents of Wilkes-Barre brought suit challenging street widening plans by Pennsylvania's Department of Transportation that allegedly would impair a public park, in violation of the environmental amendment's protection for "historical, scenic, recreational, and environmental values. . . ."<sup>242</sup> The court agreed that these provisions are self-executing against the government and that citizens, "as beneficiaries of the public trust thereby created" by the environmental amendment, have standing to bring such a suit:

There can be no question that the Amendment itself declares and creates a public trust of public natural resources for the benefit of all the people (including future generations as yet unborn) and that the Commonwealth is made the trustee of said resources, commanded to conserve and maintain them. No implementing legislation is needed to enunciate these broad purposes and establish these relationships.<sup>243</sup>

The court viewed the *Payne* case as less controversial than the *Gettysburg* case because challenges to government actions hold

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<sup>237</sup> *Id.* at 595.

<sup>238</sup> *Id.* at 597.

<sup>239</sup> *Id.* at 596.

<sup>240</sup> *Id.*

<sup>241</sup> *Payne v. Kassab*, 361 A.2d 263, 272 (Pa. 1976).

<sup>242</sup> *Id.* at 264.

<sup>243</sup> *Id.* at 272.

fewer due process or takings implications. However, even though citizens could use the environmental amendment to challenge government actions, the court in *Payne* ruled against the citizens, adopting this test:

(1) Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources? (2) Does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum? (3) Does the environmental harm which will result from the challenged decision or action so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion?<sup>244</sup>

Professor John Dernbach argues that when the court adopted the *Payne* test, it curtailed potential impacts of the amendment.<sup>245</sup> The court held that the environmental amendment creates "no automatic right to relief," but that the government must balance the public trust rights codified in the amendment against other government duties (here, maintaining a highway system). In *Payne*, the latter trumped the former.<sup>246</sup> While the balancing must take notice of the high priority given environmental conservation, as reflected in the amendment, it nonetheless requires only that government agencies take reasonable efforts to mitigate any environmental harms from projects they approve.

As a result of the three-part test, plaintiffs invoking the amendment to challenge environmentally damaging projects do not win. In fact, according to one scholar, plaintiffs have never prevailed under the *Payne* test to overturn a state action, despite over thirty challenges as of 1997.<sup>247</sup> By naming the test, the court severely limited the potential reach of the amendment beyond protections already offered in other environmental statutes.<sup>248</sup> To put it another way, "[t]he state's responsibility for publicly owned resources—the resources over which it has greatest control—is not

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<sup>244</sup> *Id.* at 273 n.23.

<sup>245</sup> John C. Dernbach, *Taking the Pennsylvania Constitution Seriously When it Protects the Environment: Part II—Environmental Rights and the Public Trust*, 104 DICK. L. REV. 97, 164 (1999).

<sup>246</sup> *Payne v. Kassab*, 361 A.2d at 273.

<sup>247</sup> Kirsch, *supra* note 224, at 1201–02. Kirsch continues, "[b]y effectively rejecting any real review under the *Payne* test, the Pennsylvania courts have undermined the intent of the Pennsylvanians who adopted the state constitution's environmental protection provision." *Id.* at 1202.

<sup>248</sup> Dernbach, *supra* note 227, at 710–12.

to conserve them or preserve their values, but rather to manage their degradation under the *Payne* test.”<sup>249</sup>

However, the environmental amendment has provided some groundwork for strengthening the common law application of the Public Trust Doctrine. Once supporting legislation passes that explicitly alludes to the constitutional provisions, the environmental amendment buttresses challenges to the legitimacy of such legislation. This helps to shore up government actions taken to fulfill its stewardship duties under the Public Trust Doctrine as now codified in the constitution, and potentially dampens takings claims. Any ambiguity inherent in the Public Trust Doctrine is made clearer by explicit provisions of the constitutional amendment. Furthermore, as in the case below, legislators and executive bureaucrats invoke the amendment when they act in ways that purport to fulfill the government’s constitutional duty to protect public trust resources.

For example, a Pennsylvania court held that the “Environmental Rights Amendment reflects a state policy encouraging the preservation of historic and aesthetic resources,” and thus government regulators in Philadelphia (who explicitly reference the amendment in their actions) could legitimately deem a privately owned theatre as an historic landmark without violating private property rights.<sup>250</sup> This decision illustrates that the constitutional provision codifying the Public Trust Doctrine permissibly expands the actual resources covered: here, the Public Trust Doctrine is held to include human-made historical structures that the government is permitted and even obliged to steward to protect the esthetic rights of all citizens.

Dernbach notes that the amendment is more symbolic than substantive and rarely used in decision-making.<sup>251</sup> However, as in the Philadelphia theatre case, the amendment supports decisions that are challenged on other grounds. Moreover, “[h]owever tentatively, such cases recognize that Article I, Section 27 matters because it does something that statutes and regulations cannot do; it makes environmental and historic protection part of the

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<sup>249</sup> *Id.* at 713.

<sup>250</sup> *United Artists’ Theater Circuit, Inc. v. City of Philadelphia*, 635 A.2d 612, 620 (Pa. 1993).

<sup>251</sup> Dernbach, *supra* note 227, at 696.



constitutional purpose of state government.”<sup>252</sup>

Dernbach argues that the amendment both codifies an expansive set of resources protected under the Public Trust Doctrine, and that the amendment is best understood to name the public’s procedural right to responsible government stewardship under their constitutionally-enforced traditional roles as public trustees.<sup>253</sup> This is what Sax envisioned as a necessary corollary of the Public Trust Doctrine. Even if citizens usually lose because of the high standards of the *Payne* test, Pennsylvania courts have interpreted the amendment to provide enhanced court access for citizen plaintiffs to challenge government actions that threaten their environmental rights.<sup>254</sup>

In *Franklin Township v. Department of Environmental Resources*, the court named its test for standing: “a party must (a) have a substantial interest in the subject-matter of the litigation; (b) the interest must be direct; and (c) the interest must be immediate and not a remote consequence.”<sup>255</sup> When a town and county challenged a toxic waste processing facility, they were considered “legal persons” whose “direct” “immediate” “substantial interest” stems from their role in protecting the “esthetic and environmental well-being.”<sup>256</sup> These are threatened, as illustrated by “[r]ecent events . . . replete with ecological horrors (e.g., Love Canal) that have damaged the environment and threatened plant, animal and human life.”<sup>257</sup> Environmental assets “are important aspects of the quality of life in our society.”<sup>258</sup> The municipalities have standing partially because “among the responsibilities of local government is the protection and enhancement of the quality of life of its citizens. Indeed, it is a constitutional charge which must be respected by all levels of government in the Commonwealth.”<sup>259</sup>

The environmental amendment thus bolsters the town’s eligibility for standing; in fact, the environmental provision seems to *require* (it is a “constitutional charge”) that it seek such standing to vindicate its citizens’ environmental rights. The court

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<sup>252</sup> *Id.* at 697.

<sup>253</sup> *Id.* at 699.

<sup>254</sup> *See id.* at 723.

<sup>255</sup> *Franklin Twp. v. Dep’t of Env’tl. Res.*, 452 A.2d 718, 719 (Pa. 1982).

<sup>256</sup> *Id.* at 720–22.

<sup>257</sup> *Id.* at 720.

<sup>258</sup> *Id.*

<sup>259</sup> *Id.* at 721–22.

concluded that “Franklin Township and Fayette County have a substantial, direct and immediate interest in the establishment and operation of a toxic waste landfill within its boundaries so as to give each standing to challenge the issuance of a permit.”<sup>260</sup>

The Public Trust Doctrine’s “substantive haziness and unclear legal foundation”<sup>261</sup> find firmer moorings in constitutional provisions guaranteeing environmental rights. While the Pennsylvania environmental amendment has not provided all the substantive results its backers might have hoped for, it has expanded (beyond the traditional reach of the Public Trust Doctrine) the procedural rights of citizens to vindicate their environmental rights. And, as in the Philadelphia theatre case, it can be invoked to support government actions that do protect public trust resources.<sup>262</sup> Officials can use the amendment as rationale to support their actions in the name of the public trust. constitutional amendments are also more permanent environmental laws that may prove inconvenient should prevailing winds of public sentiment change; while it’s easy to repeal legislation, it’s much more difficult to amend a constitution.<sup>263</sup>

But, in Pennsylvania, conservative courts have clipped the wings of a bold experiment to see how far environmental protections and procedural rights might extend when the Public Trust Doctrine is codified in the form of a constitutionally guaranteed environmental right. Pennsylvania courts have declined to take the hard, skeptical look envisioned by Sax (and envisioned by the amendment’s authors) when government actions appear to violate public trust resources as named in the environmental amendment. Had courts adopted different tests, where they viewed the amendment as limiting the government’s power or requiring it to act in a certain way to perform certain duties in the name of public trust environmental resources, or where they allowed the amendment to be self executing against private actors, the amendment might have affirmatively named additional responsibilities required under the public trust (as such amendments do in India and South Africa).

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<sup>260</sup> *Id.* at 723.

<sup>261</sup> Araiza, *supra* note 41, at 452.

<sup>262</sup> Dernbach, *supra* note 227, at 727.

<sup>263</sup> *See id.* Kirsch argues that voters opted for constitutional amendments instead of new laws because such an amendment “protects policy judgments from the ebb and flow of the political tide.” Kirsch, *supra* note 224, at 1170.

For example, a scholar points out that Louisiana courts have adopted a tougher test when examining government actions that threaten public trust resources, even though Louisiana's constitutional natural resource protections are not framed in rights language.<sup>264</sup> Louisiana courts require that government do an explicit cost benefit analysis to show that actions potentially harming environmental resources are justified by greater public good, while Pennsylvania's test requires that environmental harms "clearly outweigh" the social and economic benefits before a government action will be deemed unacceptable.<sup>265</sup> Furthermore, while the Pennsylvania *Payne* test requires only "reasonable effort" to mitigate environmental harms, Louisiana's test requires that "potential and real adverse environmental effects . . . be[] avoided to the maximum extent possible."<sup>266</sup>

Furthermore, as we saw in India and South Africa, a United States court could use the combination of the Public Trust Doctrine and an environmental rights amendment to show that citizens are directly demanding that the government take affirmative steps to vindicate their traditional, now-directly-expressed rights. The amendment could be seen as a democratic assertion that obligations the sovereign has been understood to have for centuries take on new urgency through the direct will of the people voiced in the amendment. Legislators and bureaucrats could use this as cover for actions that aggressively protect public trust assets; judges could be aggressively skeptical about government actions that fail to execute the environmental will of the people.

#### CONCLUSION: THE PUBLIC TRUST DOCTRINE, ENVIRONMENTAL HUMAN RIGHTS, AND THE FUTURE OF TAKINGS AND PRIVATE PROPERTY

I have shown that the Public Trust Doctrine, when translated into or put in service of Environmental Human Rights, offers new policy and legal strategies for protecting environmental resources, and for protecting citizens' ability to use those resources sustainably, now and in the future. That's what I believe is happening.

But underlying this article is a normative belief that this is

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<sup>264</sup> Kirsch, *supra* note 224, at 1195–96.

<sup>265</sup> *Payne*, 361 A.2d at 273 n.23.

<sup>266</sup> Kirsch, *supra* note 224, at 1201.

what *should* happen. I wish to promote a world of deep equity. By this, I mean values, actions, and laws promoting sustainable pathways that maximize the health and potential of *all* individuals, communities, and ecosystems. The equity is deep because it asks that values become rooted within each individual; because it requires a fundamental re-imagining of our community structures and responsibilities; and because these values and responsibilities must become entrenched and encoded in our legal systems. Our laws would then, in turn, support values and actions promoting even deeper equity.

The Public Trust Doctrine stands for the proposition that some of nature's gifts inherently belong to all people, and the government must steward these to prevent both private arrogation of public resources and the "tragedy of the commons" from unfettered public access to these shared resources.<sup>267</sup> Environmental Human Rights represent a growing movement to codify this belief, to make positive law that firms up the philosophy promulgated for 1,500 or so years in the name of the Public Trust Doctrine.

In addition, the Public Trust Doctrine has expanded its reach to cover more of the Earth as the interrelatedness of ecosystem processes becomes more defined, and the success of the strategy in protecting those processes becomes more apparent. Environmental Human Rights build on those legal successes, while expanding what falls under the aegis of public resources in a world of sophisticated, ecosystemic understanding.

The Public Trust Doctrine encourages government officials to fulfill their stewardship duties. Codified Environmental Human Rights not only encourage government officials to perform duties, but demand they do so, either because of (sometimes judicially enforced) interpretations of constitutional provisions, or through spreading belief that Environmental Human Rights create obligations *erga omnes*, i.e., duties that must be performed.

As advocated by Joseph Sax and as realized in various courts, the Public Trust Doctrine may provide the public with direct access to vindicate violations of the public trust by government officials. Environmental Human Rights give greater force to these procedural rights, giving enhanced access to challenge official actions that impinge upon the fundamental rights. These

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<sup>267</sup> See Garrett Hardin, *The Tragedy of the Commons*, 162 Sci. 1243 (1968).

procedural rights may either be tools for vindicating other named rights, or they may be the environmental human right themselves. Furthermore, once rights obtain, plaintiffs do not merely represent a general public good; rather, they represent their own rights. And, perhaps most significantly for private property “rights,” Environmental Human Rights leave more doors open for private parties to become defendants when they act—even on their own property—to violate the public good.

The Public Trust Doctrine urges judges to take a hard, skeptical look when government action appears to allow private interest to impede public trust environmental resources. Environmental Human Rights requires judges to take a hard, skeptical look, not just when government action appears to impede public trust resources, but when officials are not doing enough proactively to fulfill their duties to promote public trust environmental interests.

The Public Trust Doctrine naturally shrinks what constitutes private property rights (and moves us to reconsider them as “private” “property” “rights”), either because certain resources never actually were subject to private usurpation, or never should have been. As Sax puts it, “it is difficult to understand why the government should be prevented from taking property which is owned by the public as a whole.”<sup>268</sup> Environmental Human Rights further constrain “private” “property” “rights,” not only because the movement builds on the history and philosophy encoded in the Public Trust Doctrine, but because rights language, (particularly as we move further on the spectrum towards inviolable *rights*), creates obligations from which no one—including private citizens—may derogate, and which trump local or national laws. The closer we come to seeing Environmental Human Rights as inviolable *rights*, the greater the responsibility of each of us, as interconnected global citizens, not only to uphold these rights, but to promote them actively, and to shame those who do not respect or promote these rights.

Throughout United States takings jurisprudence, private property advocates have argued that government actions in the name of “public use” have chipped away at their fundamental property “rights.” They argue the Fifth Amendment exists to protect these minority rights from the tyranny of the majority, and

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<sup>268</sup> Sax, *Public Trust Doctrine*, *supra* note 9, at 479.

they protest that these rights have taken a backseat to other rights that all arms of government tend to view, unfairly, as somehow more fundamental. Certainly, United States governments at all levels have acted aggressively to circumscribe what individuals may do with/on their own property, and courts have backed up government actions taken in the name of "public use" or the "public good." The *Mugler v. Kansas* and *Hadacheck v. Sebastian* line of takings cases held that private property never connotes the right to commit public nuisance, and government may redefine what constitutes an impermissible nuisance with no resulting takings claims for those who had previously been acting within the bounds of acceptable property use.<sup>269</sup> As the Court notes in *Hadacheck*, "[t]here must be progress, and if in its march private interests are in the way they must yield to the good of the community."<sup>270</sup> The *National Audubon Mono Lake* case and its progeny show that water "rights" are not property, but a kind of revocable, usufruct privilege that is and always has been subject to government redefinition to reflect the changing needs of the citizenry—to reflect changing notions of progress. The "owner" of such "rights" is always on notice of this, and thus when government redefines the privilege, the "owner" has no grounds for a takings claim.<sup>271</sup>

In *Penn Central Transportation Co. v. New York*, the Supreme Court named a balancing test that gives governments broad latitude to define what serves the public interest, and thus what constraints may be placed on private property in the public's name.<sup>272</sup> The Public Trust Doctrine supports the notion that "private" "property" "owners" "investment-backed expectations"<sup>273</sup> should always include the idea that certain resources are and always have been within the public's provenance. Environmental constitutional provisions more clearly

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<sup>269</sup> See *Mugler v. Kansas*, 123 U.S. 623 (1887); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915).

<sup>270</sup> *Hadacheck*, 239 U.S. at 410.

<sup>271</sup> *Nat'l Audubon Soc'y v. Superior Court*, 658 P.2d 709, 722 (Cal. 1983). See also *United States v. Rands*, 389 U.S. 121, 123 (1967) (holding that riparian private property owners have always been subject to the federal government's navigational servitude, and thus appellant receives no full market value takings compensation for a property right they never fully possessed).

<sup>272</sup> 438 U.S. 104, 124 (1978) (balancing nature and strength of government's regulatory interest for the public good against economic loss of property owner).

<sup>273</sup> *Id.*

enunciate what the public wishes done in its own name. They tip the balancing test a bit further by putting direct democracy in service of state actions that steward natural resources (even those found on private property) for the public good.

Even bright line rules that attempt to name when government goes “too far” to protect the public—i.e., when physical occupation<sup>274</sup> or regulations that result in 100% loss of economic value<sup>275</sup> constitute an impermissible violation of private property “rights”—rarely obtain in the real world of takings jurisprudence. That is to say, even without invoking the Public Trust Doctrine or Environmental Human Rights, United States governments, abetted by the courts, have acted as if very little is fundamental in terms of a “right” to use one’s property as one wishes.

The Public Trust Doctrine suggests, and Environmental Human Rights push hard, the notion that the minority never had these rights in the first place. Private property rights advocates might say that Justinian defined the Public Trust Doctrine (and associated private property rights) by *ipse dixit*, an unfounded assertion, and subsequent generations have impermissibly and mysteriously reified the Doctrine by chanting its name loudly and repeatedly. But those speaking on behalf of the Public Trust Doctrine or Environmental Human Rights might argue that private property “rights” advocates have engaged in ipse dixitism by asserting that Lockean natural law<sup>276</sup> justifies private property ownership, due in some mysterious way to the natural endowments (or, as Madison put it, from the “diversity in the faculties of men”<sup>277</sup>) that naturally justifies the right of some to usurp portions of the Earth that ought to belong to us all. Environmental Human Rights counters this by suggesting that the inherent dignity of all humans depends on sustainable access to certain natural goods and services.

While some of our founding fathers saw private property as the key to freedom,<sup>278</sup> the Public Trust Doctrine and Environmental Human Rights suggest freedom requires access to a

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<sup>274</sup> See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982);

<sup>275</sup> See, e.g., *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

<sup>276</sup> JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* 16–17 (1998).

<sup>277</sup> *Id.* at 49 (quoting *THE FEDERALIST* NO. 10 (James Madison)).

<sup>278</sup> *Id.* at 3–4.

wide range of ecological assets that ought always to have been in the public realm. They further suggest that property rights spring not from natural law but from positive law, rooted in the will of the people, which allow temporary loans of property “rights” from the sovereign acting in the name of the public good. Benjamin Franklin believed that “Property . . . is a Creature of Society, and is subject to the Calls of that Society, whenever its Necessities shall require it . . . .”<sup>279</sup> What the sovereign gives in the name of the people, the sovereign can redefine or revoke when the people’s needs change.

Furthermore, I believe the “natural law” Madison and others used to justify private property “rights” is gradually being replaced by a different kind of “natural law”: rather than reflect some divinely ordained order, human laws must reflect some ecologically ordained restraints. To survive as a civilization, or as a species, means to heed the limits a mechanical natural world imposes on us. We are biological creatures who pretend we transcend biology. “Private property” advocates sometimes argue that they are best stewards of the land, but it would take several more papers to document how reality often fails to reflect this. In the name of capitalism—a social and economic system that largely ignores the ecological basis of our existence—private property owners exploit resources we increasingly recognize we need for the public good, or even for human survival. With human numbers and needs increasing, and with growing evidence that business as usual results in degraded ecosystems, and with the ominous specter of large scale global disruptions, the balance is tilting—as it should—away from preference for the “private” and towards preference for protection of the “public.” When something is defined as an environmental human right, we must reconsider the balance between private commercial and public environmental interests so that the latter’s stock is on the rise. In capitalist societies, naming Environmental Human Rights provides strong ethical justification that helps to recalibrate priorities that normally favor economic freedom over other kinds of human freedoms.

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<sup>279</sup> William Michael Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 700 (1985) (quoting Benjamin Franklin, *Queries and Remarks Respecting Alterations in the Constitution of Pennsylvania*, in 10 THE WRITINGS OF BENJAMIN FRANKLIN 54, 59 (A. Smyth ed. 1907)).



Environmental Human Rights, the further they are towards the inviolable *rights* end of the spectrum, suggest that it does not matter what property owners' expectations *were*: they have nonderogable duties *now* that are supreme to any expectations they might have had or laws that might have facilitated those expectations. World consensus—as reflected in national constitutions, international agreements, and the work of legal scholars—is nudging this notion of Environmental Human Rights towards status of fundamental rights, or even inviolable *rights*. While the United States lags behind nations like India or South Africa in recognizing Environmental Human Rights, as we saw in the Ninth Circuit's *Sarei* decision,<sup>280</sup> and we see in hesitant attempts to amend state constitutions (and to effectuate those amendments), that Environmental Human Rights may yet obtain in the United States. The United States is now awakening from its long slumber and confronting the reality of global climate change; multiple laws committing individual states to curb greenhouse gas emissions, and nascent federal initiatives following state and international leads will further constrain “private” “property” “owners’” ability to degrade common resources—the air, the ice caps, the oceans—that ought to be stewarded in public trust for the survival of all citizens of Earth.

The Public Trust Doctrine has always reflected a value preference for public over private access to environmental assets. Invoking environmental rights as human rights amplifies the public's right, now and in the future, to share in ecological gifts fundamental to human health and wellbeing. By linking the hoary Public Trust Doctrine to the modern Environmental Human Rights movement, citizens, scholars, and lawyers can promote a world of deeper equity for individuals, communities, and the natural world.

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<sup>280</sup> *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193 (9th Cir. 2007).

